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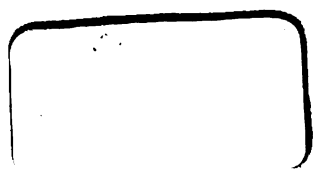
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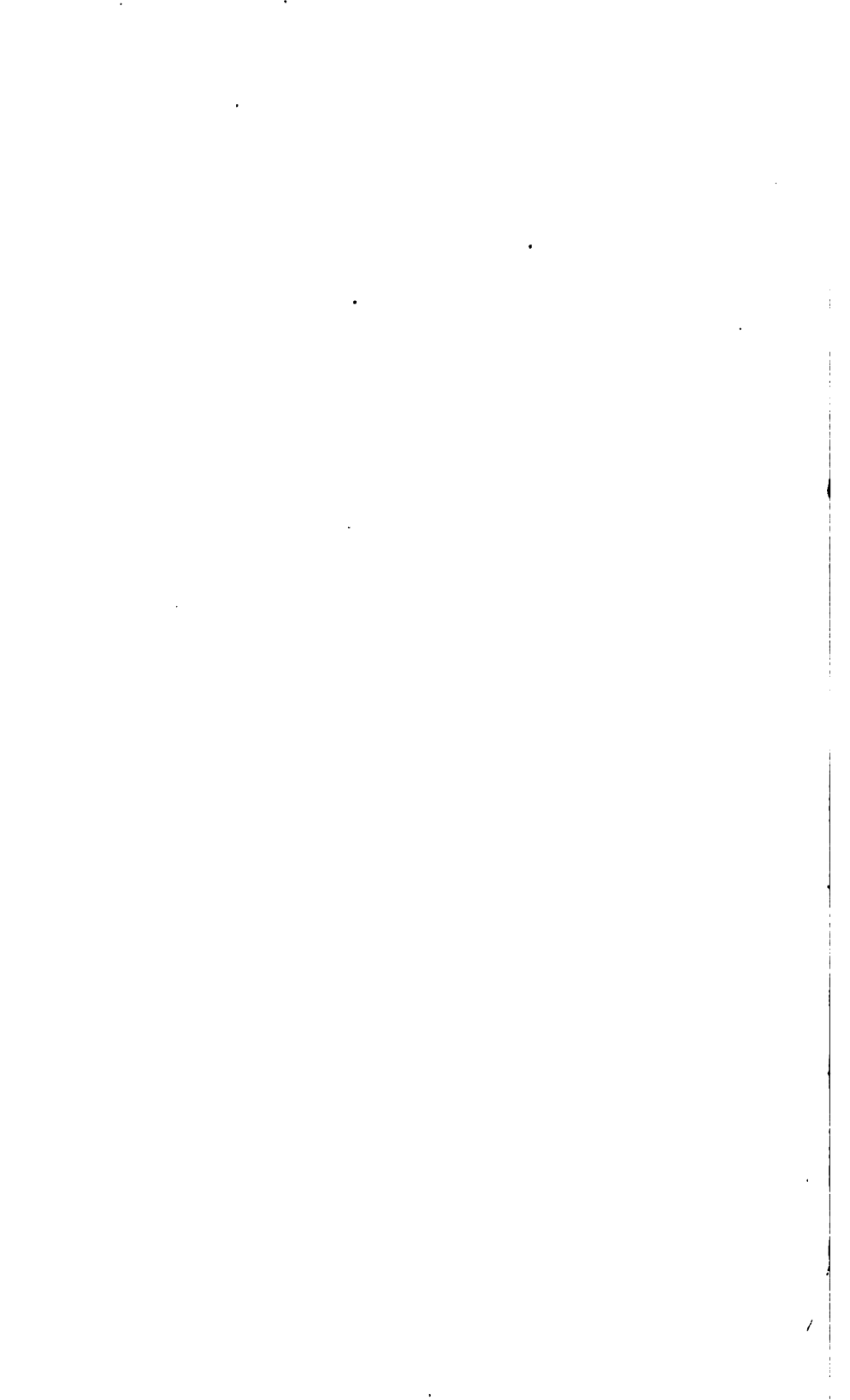
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# HISTORY AND DIGEST

OF THE

## INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY,

TOGETHER WITH

APPENDICES CONTAINING THE TREATIES RELATING TO SUCH  
ARBITRATIONS, AND HISTORICAL AND LEGAL NOTES ON  
OTHER INTERNATIONAL ARBITRATIONS ANCIENT AND  
MODERN, AND ON THE DOMESTIC COMMISSIONS  
OF THE UNITED STATES FOR THE ADJUST-  
MENT OF INTERNATIONAL CLAIMS.

BY

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## APPENDIX I.

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## CHAPTER A.

### FRENCH INDEMNITY: CONVENTION OF APRIL 30, 1803.

**Treaties of 1778.** At the close of the American Revolution the relations between the United States and France were regulated by two treaties, one of amity and commerce and the other of alliance, both of which were concluded on the 6th of February 1778. Before the end of the century various provisions in these treaties became the subject of international discussion. These provisions will be cited in the narration of the disputes that arose concerning them; but it may be useful now to refer to some of them, which figure most prominently in the history of subsequent events.

**Treatment of Prizes.** By Article XVII. of the treaty of amity and commerce, it was provided that the ships of war and privateers of either party might, in time of war, freely carry their prizes into the ports of the other party; that such prizes should not, when so brought in, "be arrested or seized"; that they should not be subject to "search," or to "examination" as to their "lawfulness;" but that they might be taken away at any time to the places expressed in the commissions of their captors, which commissions the captors should be obliged to show. On the other hand, it was provided that "no shelter or refuge" should be given by either party to vessels which had "made prize of the subjects, people or property" of the other party; but that such vessels, if forced in by "stress of weather, or the danger of the sea," should be required to depart "as soon as possible."

**Foreign Privateers.** By Article XXII. of the same treaty it was provided that neither party should permit privateers having commissions from any prince or state in enmity with the other party, to fit out in its ports, or to sell their prizes, or even to purchase victuals, except such as should be necessary for a voyage to the next home port.

**Free Ships, Free Goods.** By Article XXIII. it was provided that free ships should make free goods.

**The Alliance.** By Article XI. of the treaty of alliance, which was described (Article II.) as a "defensive alliance," the "essential and direct end" of which was "to maintain effectually the liberty, sovereignty and independence" of the United States "as well in matters of government as in commerce," the United States, in return for the guaranty of "their liberty, sovereignty and independence, \* \* \* and also their possessions," guaranteed "to His Most Christian Majesty the present possessions of the Crown of France in America, as well as those which it may acquire by the future treaty of peace." And in order "to fix more precisely the sense and application" of

this article, it was declared (Article XII.) "that in case of a rupture between France and England the reciprocal guaranty declared in the said article shall have its full force and effect the moment such war shall break out."

Five years after the signature of the definitive treaty of peace between the United States and Great Britain, a consular convention between the United States and France was concluded. The negotiations which resulted in its signature began in 1782. On the 25th of January in that year a scheme of such a convention, which had been approved by Congress, was sent to Franklin with instructions to make it the basis of a formal treaty. On the 29th of July 1784 he signed a convention, but it proved to be unsatisfactory to Congress on grounds which are fully set forth in a report made by Mr. Jay, as Secretary for Foreign Affairs.<sup>1</sup> The original scheme of Congress, from which Franklin had departed, was regarded by Mr. Jay as being also in many respects open to objection, but he recommended that, as the negotiations had proceeded so far, Mr. Jefferson, who had succeeded Franklin at the Court of Versailles, should be directed to negotiate a convention in substantial conformity with it.<sup>2</sup> Instructions were given in accordance with this recommendation, and on November 14, 1788, Jefferson concluded a new convention. Mr. Jay, though he apprehended that it would prove more inconvenient than beneficial to the United States, advised that it be ratified, since it adhered to the plan to which the United States was already committed.<sup>3</sup>

By Article VIII. of this convention it was provided that consular officers should "exercise police over all the vessels of their respective nations," and should "have on board the said vessels all power and jurisdiction in civil matters in all the disputes which may there arise;" and that they should "have an entire inspection over the said vessels, their crew, and the changes and substitutions there to be made." It was, however, provided that these functions should be "confined to the interior of the vessels," and that they should not be permitted to interfere "with the police of the ports" in which the vessels might happen to be.

The ratifications of this convention were exchanged at Paris on the 6th of January 1790; but before the close of the year a controversy arose between the two countries in regard to matters of commerce. By royal decrees of December 29, 1787,<sup>4</sup> and December 7, 1788,<sup>5</sup> exceptional favors were granted to commerce with the United States in respect of various articles, such as whale oils and spermaceti, fish and fish oils, agricultural products, products of the forest, and certain manufactured articles. But, in spite of favors, the commerce of the United States tended to revert to its former channels. Commerce with England increased, while trade with France languished and failed.<sup>6</sup> The development of this tendency produced in

<sup>1</sup> March 9, 1786, Dip. Cor. 1783-1789, I. 218.

<sup>2</sup> Dip. Cor. 1783-1789, I. 232.

<sup>3</sup> Am. State Papers, For. Rel. I. 89.

<sup>4</sup> Id. 113.

<sup>5</sup> Id. 116.

<sup>6</sup> Id. 120.

France a feeling of dissatisfaction, which was intensified by the disposition of Congress to subject commerce with France to the same regulations as that with Great Britain. By an act of July 20, 1789,<sup>1</sup> a duty of 6 cents a ton was imposed on American-built vessels belonging to citizens of the United States, while a duty of 30 cents a ton was imposed on such vessels belonging wholly or in part to aliens, and of 50 cents a ton on all other vessels. This act was renewed on the 20th of the following July.<sup>2</sup>

By a royal decree of France of December 29, 1787, vessels built in the United States and sold in France, or purchased by Frenchmen, were exempt from all duties. The French chargé d'affaires at Philadelphia complained, by direction of his government, against the acts of 1789 and 1790 as an infraction of the fifth article of the treaty of amity and commerce of 1778. This article was connected with the third and fourth articles of the same treaty, by which it was respectively provided that French subjects in the United States, and citizens of the United States in France, should pay no other or greater duties than were required of the subjects or citizens of the most favored nations. "In the above exemption," says Article V., "is particularly comprised the imposition of 100 sols per ton, established in France on foreign ships." It was contended by France that the effect of this provision was to exempt the ships of the contracting parties from the payment of any tonnage duties, and that the failure of Congress to make an exception in favor of France constituted a violation of the treaty, and placed French commerce on the same footing as English. Jefferson, who had then become Secretary of State, answered that the stipulation in regard to the duty of 100 sols in France merely relinquished an antecedent exaction from which the most favored nations were already exempt, and left both parties free to impose other duties, provided all nations were subjected to them alike. In other words, he maintained that the provisions of the third and fourth articles were not enlarged by the provisions of the fifth article, but that the latter was intended, out of abundant caution, to designate by name a particular duty against which it was desired to guard. Nevertheless, he advised that the claim of the French Government should be allowed, especially in consideration of the privileges granted to the United States by the royal decrees of 1787 and 1788.<sup>3</sup> The acts of Congress, however, were not modified. Indeed, before the complaint of the French chargé d'affaires was communicated to the Senate an extract was sent to that body from a letter of Mr. Short, the chargé d'affaires of the United States in France, by which it appeared that the National Assembly was then engaged in the adoption of measures which subjected the commerce of the United States to onerous burdens and put an end to the commercial system which prevailed before 1789.<sup>4</sup>

On the 12th of January 1792 Gouverneur Morris was  
Gouverneur Morris. appointed by Washington as minister plenipotentiary to France. Since September 26, 1789, when Jefferson, who had accepted the office of Secretary of State, placed William Short in

<sup>1</sup> 1 Stats. at L. 27.

<sup>2</sup> 1 Stats. at L. 135.

<sup>3</sup> Am. State Papers, For. Rel. I. 109.

<sup>4</sup> Id. 120-132.

charge of the legation at Paris, the post had been vacant. The appointment of Morris was made by Washington not without misgivings; for while entertaining absolute confidence in Morris's integrity, he recognized, in the opposition which the nomination excited in the Senate, the fact that the possession of a "lively and brilliant imagination" and a "gift of ridicule" would require of Morris, in the delicate situation in which he was placed, the exercise of unusual caution.<sup>1</sup> There was, however, another ground of opposition to Morris's appointment. "It was urged," said Washington, in an admonitory letter, "that in France you were considered as a favorer of the aristocracy and unfriendly to its revolution." In what sense this was true no one understood better than Washington, with whom Morris had for three years been in correspondence in regard to events in France. In his own country Morris had been a supporter of the Revolution, a member of the Continental Congress, assistant to Robert Morris in the management of the public finances,<sup>2</sup> and a member of the Constitutional Convention of 1787. To mental gifts of a high order he united a capacity for public business. In his views of government he belonged to the same school as Washington. He regarded the maintenance of a just public authority not as a menace to liberty, but as its essential safeguard. In the first stages of the French revolution he could see "every reason to wish that the patriots may be successful," though he apprehended that the "crumbling matter" on which the edifice of freedom was to be erected would, when exposed to the air, "fall and crush the builders."<sup>3</sup> He instinctively recoiled from the excesses that were committed when his apprehensions came to be fulfilled. Before he became minister of the United States he offered his counsel to Louis XVI. He afterward sought to effect that monarch's escape; and having witnessed the execution both of the King and the Queen, and the destruction of all public authority, he prophesied that, whatever might be the lot of France in remote futurity, she must soon come, probably through the medium of a triumvirate or other small body of men, to be "governed by a single despot."<sup>4</sup> Such was the man whom Washington chose as minister to France. While it was impossible for him to be acceptable to the revolutionary leaders, who, following each other in quick and violent succession, exhibited in their elevation and their fall the tempestuous and fickle impulses of unrestrained popular passion, he at any rate possessed an intimate knowledge of the conditions and tendencies of the time, and was not likely to commit his government to extravagant policies.

**Proffer of Commercial  
Negotiation.**

At the period of Morris's appointment, the commercial relations between the United States and France had fallen into an unfortunate condition. With a view to restore them to their former state, as well as to improve the political relations of the two countries, Jefferson desired to conclude a new commercial convention. He expressed to Morris his disappointment that overtures had not been made to the United States for a treaty of commerce,

<sup>1</sup> Writings of Washington, ed. by Sparks, X. 216-218.

<sup>2</sup> Wharton's Dip. Cor. Am. Rev. IV. 622.

<sup>3</sup> Letter to Washington, April 29, 1789, Am. State Papers, For. Rel. I. 379.

<sup>4</sup> Letter to Washington, October 18, 1793, Am. State Papers, For. Rel. I. 398.

and said that if the National Assembly expected the United States to declare their readiness to meet them on that ground, they would not hesitate to make such a declaration. In the mean time he desired that matters might be placed in their former condition, by the repeal of "the late innovations as to our ships, tobacco, and whale oil."<sup>1</sup> He was anxious lest the postponement of a conventional arrangement might compel the United States to resort to retaliatory measures in order to do justice to their own navigation.<sup>2</sup> On the 9th of July 1792 Morris proposed to the French Government the negotiation of a commercial treaty, and in so doing adverted to the discontent excited in America by the decrees of the Constituent Assembly. On the 23d of July he received a reply in which a promise was made that his proposal would be communicated to the King and to the National Assembly.<sup>3</sup>

On the 16th of August Morris announced that another Revolution of August 1792. revolution had been effected in Paris, and that "it was bloody."<sup>4</sup> On the 10th of August the King was deposed, and the revolution progressed rapidly amid scenes of bloodshed and confusion. Morris asked for instructions respecting the conduct he should pursue "in the circumstances about to arise." The present executive was, he said, just born, and might be stifled in the cradle; and he found himself "in a state of contingent responsibility of the most delicate kind."<sup>5</sup> Jefferson replied that it accorded with the principles of the United States "to acknowledge any government to be rightful which is formed by the will of the nation substantially declared;" that with such a government "every kind" of business might be done; but that there were "some matters" which might be transacted with a government *de facto*, such, for example, "as to reform the unfriendly restrictions of our commerce and navigation." Unless, said Jefferson, "the late innovations" were revoked the United States must lay additional and equivalent burdens on French ships by name.<sup>6</sup>

When Morris, on the 13th of February 1793, acknowledged the receipt of these instructions, Louis XVI. had been beheaded and war against England had been declared. "You had previously instructed me," wrote Morris to Jefferson, "to endeavor to transfer the negotiation for a new treaty to America; and if the revolution of the 10th of August had not taken place, but instead thereof the needful power and confidence had been restored to the crown, I should perhaps have obtained what you wished, as a mark of favor and confidence. \* \* \* At any rate, the thing you wished for is done, and you can treat in America, if you please. Whether you will or not is another affair."<sup>7</sup> In truth, Morris did not believe that the negotiation

<sup>1</sup> Jefferson to Morris, March 10, 1792, Jefferson's Works, ed. by Washington, III. 338.

<sup>2</sup> Jefferson's Works, ed. by Washington, III. 356, 449.

<sup>3</sup> Am. State Papers, For. Rel. I. 332-333.

<sup>4</sup> Am. State Papers, For. Rel. I. 333.

<sup>5</sup> Am. State Papers, For. Rel. I. 334.

<sup>6</sup> Jefferson's Works, ed. by Washington, III. 489.

<sup>7</sup> Am. State Papers, For. Rel. I. 350.

could then be successfully conducted or that any engagements which might be formed would be stable.

The internal disorders of France were naturally reflected in the management of her foreign relations.

*Appointment of Genet.* Before the deposition of the King, Morris insisted upon and obtained the removal of a person who had been appointed as minister to the United States, a person whose character he pronounced "as bad as need be and stained by infamous vices."<sup>1</sup> When another minister was appointed, Morris did not receive from official sources any information "either of his mission or his errand." This circumstance, however, was due perhaps not so much to Morris's interference with the former appointment as to the fact that he was, as he himself declared, cordially hated by some of the members of the diplomatic committee. The new minister was M. Edmond C. Genet, a man of some experience, who might have been useful in subordinate positions, but who lacked the sense and discretion requisite to the discharge of a responsible part. He once spoke of himself as having spent seven years at the head of a bureau at Versailles, under the direction of Vergennes, and of having passed one year at London, two at Vienna, one at Berlin, and five in Russia.<sup>2</sup> Morris reported, as the result of inquiries, that Genet was a man of good parts and very good education, brother to the Queen's first woman, from whence his fortune originated; that he was, through the Queen's influence, appointed as *chargé d'affaires* at St. Petersburg, where, in consequence of dispatches from M. de Montmorin, which were written in the sense of the revolution, but which he interpreted too literally, he made some representations in a much higher tone than was wished or expected; that as it was not convenient under the circumstances either to approve or to disapprove his conduct, his communications lay unnoticed; that, being a young man of ardent temper, he felt himself insulted, and wrote some petulant dispatches, believing that if the royal party prevailed his sister would make fair weather for him at court; that on the overthrow of the monarchy, these dispatches operated as credentials to the new government, and, in the dearth of competent men, opened the way to his preferment, and that in this situation he chose America as the best harbor during the storm, and would not put to sea again till it was fair weather.<sup>3</sup>

*Genet's departure for the United States.* Before he left France Genet called on Morris and apologized for the failure of M. Le Brun, the minister of foreign affairs, on account of the pressure of public business, to come and present him.<sup>4</sup> What Genet subsequently did in France does not appear, but Morris, in reporting his departure for the United States, observed that "the pompousness of this embassy could not but excite the attention of England."<sup>5</sup> Whatever it may have been that

<sup>1</sup> Am. State Papers, For. Rel. I. 333.

<sup>2</sup> Genet to Jefferson, November 15, 1793, Am. State Papers, For. Rel. I. 183.

<sup>3</sup> Morris to Washington, December 28, 1792, Am. State Papers, For. Rel. I. 392.

<sup>4</sup> Morris to Jefferson, March 26, 1793, Am. State Papers, For. Rel. I. 356-358.

<sup>5</sup> Am. State Papers, For. Rel. I. 350.



called forth this remark, there can be no doubt that Genet set out on his mission gurgling with the fermentation of the new wine of the revolution. Having attained "the happiness of serving a free people," he seems to have resolved that nothing should be wanting to the energy of his conduct. And he had scarcely left France when Morris reported that the executive council had sent out by him three hundred blank commissions for privateers to be distributed among such persons as might be willing to fit out vessels in the United States to prey on British commerce.<sup>1</sup>

On the 18th of April 1793, before this report was received, Washington submitted to the various members of his cabinet a series of questions touching the relations between the United States and France.<sup>2</sup> The first of these questions was whether a proclamation of neutrality should issue; the second, whether a minister from the republic of France should be received; the third, whether, if received, it should be absolutely or with qualifications, and the fourth, whether the United States were obliged to consider the treaties previously made with France as still in force. It seems that the question whether Genet should be received was suggested by Hamilton at a meeting of the cabinet on the 25th of February, and that the President, the Secretary of State, and the Attorney-General at that time were all disposed to give an affirmative answer.<sup>3</sup> At a meeting of the cabinet on the 19th of April it was determined, with the concurrence of all the members, that a proclamation of neutrality should issue. It was also unanimously agreed that the minister from the French republic should be received. On the third question, whether he should be received absolutely or with qualifications, Hamilton was supported by Knox in the opinion that the reception should be qualified. The President, Jefferson, and Randolph inclined to the opposite opinion; but the third and fourth questions were postponed for further consideration. In a subsequent written opinion Hamilton argued that the reception of Genet should be qualified by a previous declaration to the effect that the United States reserved the question whether the treaties, by which the relations between the two countries were formed, were not to be deemed temporarily and provisionally suspended. He maintained that the United States had an option so to consider them, and would eventually have a right to renounce them, if such changes should take place as could *bona fide* be pronounced to make a continuance of the connections which resulted from them disadvantageous and dangerous.<sup>4</sup> He also thought the war plainly offensive on the part of France, while the alliance was defensive.<sup>5</sup> On the other hand, Jefferson maintained that the treaties were not "between the U. S. & Louis Capet, but between the two nations of America and France," and that "the nations remaining in existence, tho' both of them have since changed their forms of government, the treaties are not annulled by these

<sup>1</sup> Morris to Thomas Pinckney, March 2, 1792, Am. State Papers, For. Rel. I. 396; Morris to Jefferson, March 7, 1792, Id. 354.

<sup>2</sup> Writings of Washington, ed. by Sparks, X. 533.

<sup>3</sup> Jefferson's Works, ed. by Washington, IX. 140.

<sup>4</sup> Hamilton's Works, ed. by Lodge, IV. 74-79.

<sup>5</sup> Id. 101.

changes." He also contended that the reception of a minister had nothing to do with this question.<sup>1</sup>

**Proclamation of  
Neutrality.**

On the 22d of April 1793, Washington published the following proclamation of neutrality.<sup>2</sup>

"Whereas it appears that a state of war exists between Austria, Prussia, Sardinia, Great Britain, and the United Netherlands, of the one part, and France on the other, and the duty and interest of the United States require that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial towards the belligerent Powers:

"I have therefore thought fit by these presents to declare the disposition of the United States to observe the conduct aforesaid towards those powers respectively; and to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever, which may in any manner tend to contravene such disposition.

"And I do hereby also make known, that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding, or abetting hostilities against any of the said powers, or by carrying to any of them those articles which are deemed contraband by the modern usage of nations, will not receive the protection of the United States, against such punishment or forfeiture; and further, that I have given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of the United States, violate the law of nations, with respect to the powers at war, or any of them.

"In testimony whereof, I have caused the seal of the United States of America to be affixed to these presents, and signed the same with my hand. Done at the city of Philadelphia, the twenty-second day of April, one thousand seven hundred and ninety-three, and of the Independence of the United States of America the seventeenth.

"By the President:

"GEORGE WASHINGTON.

"TH. JEFFERSON."

On the 8th of April 1793, just two weeks before the issuance of this proclamation, Genet arrived at Charleston, South Carolina; but the news of his arrival there was received at Philadelphia, through the medium of the public press, only on the day on which the proclamation was published. At Charleston he lost no time in fitting out and commissioning privateers, and, after having got a number ready for sea, he proceeded to make the journey to the seat of the national government by land. On the way he incited the people to hostility against Great Britain, and received such demonstrations of sympathy as to strengthen his confidence in the success of the course on which he had entered. Before he was received by the President it was learned by public report that the cruisers which he had fitted out had made captures and brought them into the ports of the United States, and that the French consuls had assumed judicial authority to condemn them and order their sale as lawful prize.

The posture of affairs between the United States and France at this time was peculiar. In spite of the acts of the National Assembly, of which Jefferson in his early instructions to Morris complained, and of the depredations on American commerce against which Morris was so constantly required to

<sup>1</sup> Jefferson's Works, ed. by Ford, VI. 219, 220.

<sup>2</sup> Am. State Papers, For. Rel. I. 140.

remonstrate, there is ample evidence that the French Government, at the outbreak of the war with England, desired to consider the treaties with the United States of 1778 as still subsisting in full force. In a letter to Jefferson of February 13, 1793, Morris narrates an interview with Le Brun, the French minister of foreign affairs, just before the declaration of war with England. In the course of this interview Morris observed that Mr. Hammond, the British minister to the United States, doubtless would exert himself to inculcate the opinion that the treaty of alliance with France, having been made by the King, was rendered void by the revolution. Le Brun replied that "such an opinion was absurd." Morris then observed, unofficially, that he entertained similar sentiments, but that he thought it would be well to evince "a degree of good will to America, which might prevent disagreeable impressions."<sup>1</sup> In a note of March 24, 1793, Morris, in complaining of the violences committed on American vessels by French privateers, invoked the provisions of the fifteenth article of the treaty of amity and commerce; and Le Brun, in his reply, expressed France's desire "of cementing more and more the connections of friendship and fraternity with her friends and allies, the United States."<sup>2</sup> In the subsequent correspondence, as well as in the acts of the National Convention, the treaties of 1778 were continually referred to as binding engagements.<sup>3</sup>

The Territorial  
Guaranty.

Nevertheless, the French republic did not ask of the United States the execution of the territorial guaranty of the treaty of alliance. This fact may be accounted for by either of two reasons. The general arming of the whole population, and the exhaustive devotion of the resources of the country to military purposes, caused a scarcity in France both of money and of provisions. The United States, as a neutral, could form a source of supply of both. In a letter to Morris of March 29, 1793, Le Brun, referring to the alleged connivance of Americans and Englishmen in covering with the flag of the United States the nationality of English vessels, said: "In order to preserve to the citizens of the United States all the advantages which result from their neutrality, it is the interest of the American government to hinder this fraud."<sup>4</sup>

This was nearly a month before the issuance of Washington's proclamation of neutrality, and before the Government of the United States had actually determined upon the course which it would pursue. In a report to the Committee of Public Safety in June 1793 Le Brun, in discussing and insisting upon the importance of protecting American neutrality, said: "The United States become more and more the granary of France and her colonies; they manifest the most favorable dispositions of succoring us; and the courage which they have discovered in formally acknowledging the French republic, in spite of the menaces and intrigues of England, proves that their friendship for us is above all political or interested considerations."<sup>5</sup>

<sup>1</sup> Am. State Papers, For. Rel. I. 350.

<sup>2</sup> Id. 358, 359, 361.

<sup>3</sup> Id. 362-363.

<sup>4</sup> Id. 360.

<sup>5</sup> Id. 368.

On February 18 and March 26, 1793, decrees were adopted by the National Convention putting American vessels on the same footing as French vessels in French ports.<sup>1</sup>

But there may be yet another reason why the United States were not called upon to execute the territorial guaranty of the treaty of alliance. It is not improbable that the National Assembly, while balancing the advantages of American neutrality against those of the treaty of alliance, doubted whether the guaranty was precisely applicable to the conditions then existing. It is true that war with England had broken out, but it is also true that it was an incident of the general conflict in which France was then engaged with other powers of Europe. This idea is suggested in the original instructions to Genet, which, though they were given before the conflict with England began, were written in contemplation of hostilities with that country as well as with Spain; and these instructions were directed to the formation of a new commercial and political connection with the United States, adapted to the conditions which the French revolution had produced. Genet was instructed that the treaty which he was authorized to negotiate, might assume the form of "a national agreement, in which two great peoples shall suspend their commercial and political interests, and establish a mutual understanding to defend the empire of liberty, wherever it can be embraced; to guarantee the sovereignty of the people, and punish those powers who still keep up an exclusive colonial and commercial system, by declaring that their vessels shall not be received in the ports of the contracting parties. \* \* \* However vast this project may be," continued the instructions, "it will not be difficult to execute, if the Americans determine on it; and it is to convince them of its practicability that the Citizen Genet must direct all his attention; for, besides the advantages which humanity in general will draw from the success of such a negotiation, we have at this moment a particular interest in taking steps to act efficaciously against England and Spain, if, as everything announces, these powers attack us from hatred of our principles \* \* \*. The military preparations making in Great Britain become every day more and more serious, and have an intimate connection with those of Spain. The friendship which reigns between the ministers of the last power and those of St. James' proves it; and in this situation of affairs we ought to excite by all possible means the zeal of the Americans, who are as much interested as ourselves in disconcerting the destructive projects of George III. in which they are probably an object. \* \* \* As it is possible, however, that the false representations which have been made to Congress of the situation of our internal affairs, of the state of our maritime force, of our finances, and especially of the storms with which we are threatened, may make her ministers, in the negotiations which the Citizen Genet is entrusted to open, adopt a timid and wavering conduct, the executive council charges him, in expectation that the American government will finally determine to make common cause with us, to take such steps as will appear to him exigencies may require, to serve the cause of liberty and the freedom of the people."<sup>2</sup> Nor were these the only objects of Genet's mission, the full purposes of which

<sup>1</sup>Am. State Papers, For. Rel. I. 362-363.

<sup>2</sup>Id. 708-709.

were unknown to the Government of the United States. "By a treaty in 1763 (first made public in 1836) France ceded Louisiana to Spain. Genet was instructed to sound the disposition of the inhabitants of Louisiana toward the French republic, and to omit no opportunity to profit by it, should circumstances seem favorable. He was also to direct particular attention to the designs of the Americans upon the Mississippi."<sup>1</sup>

Genet's Official  
Reception.

When Genet arrived in Philadelphia, an unqualified reception was promptly accorded him. In presenting his letters of credence on the 18th of May, he stated that his government knew that "under present circumstances" they had a right to call upon the United States for the guarantee of their islands, but declared that they did not desire it.<sup>2</sup> And in a note of the 23d of May he proposed that the two peoples should "by a true family compact, establish a commercial and political system," on a "liberal and fraternal basis."<sup>3</sup> The Senate not being then in session, Jefferson apprised him "that the participation, in matters of treaty, given by the Constitution to that branch of our government, would, of course, delay any definitive answer to his friendly proposition."<sup>4</sup>

Controversy with  
Genet.

Meanwhile the administration took measures to vindicate its proclamation of neutrality, which was constantly violated by the fitting out of privateers, the condemnation of prizes by French consuls sitting as courts of admiralty, and even by the capture of vessels within the jurisdiction of the United States. These proceedings, in which he was himself directly implicated, Genet defended as being in conformity not only with the treaties between the two countries, but also with the principles of neutrality. When Jefferson cited the utterances of writers on the law of nations, Genet repelled them as "diplomatic subtleties," and as "aphorisms of Vattel and others." He claimed the right to fit out and arm vessels in the ports of the United States under the twenty-second article of the treaty of amity and commerce, maintaining that the contracting parties, in declaring that it should not be lawful for persons, having commissions from any other prince or state in enmity with either nation, "to fit their ships in the ports of either the one or the other of the aforesaid parties," by implication conceded the right to do so to the citizens and subjects of each other. On the other hand, the United States denied that the contracting parties, in agreeing to observe the duties of neutrality toward each other, incurred an obligation to violate them with respect to other powers. Genet maintained that, by the seventeenth article of the treaty of amity and commerce the executive and judicial authorities were precluded from interfering in any manner with the prizes brought into the ports of the United States by the French privateers. The United States, on the other hand, while disclaiming any pretension "to try the validity of captures made on the high seas by France, or any other nation, over its enemies," denied that the contracting parties, in agreeing that each other's prizes

<sup>1</sup> Davis' Notes, Treaties and Conventions between the United States and other Powers, 1776-1887, p. 1296.

<sup>2</sup> Jefferson's Works, ed. by Washington, III. 563.

<sup>3</sup> Am. State Papers, For. Rel. I. 147, 156, 245.

<sup>4</sup> Id. 172, 707.

should not be subject to arrest or search, or to examination as to their lawfulness, deprived themselves of the right to interfere to prevent the capture and condemnation of prizes in violation of their own neutrality and sovereignty. Genet maintained that the cognizance of all questions relating to the lawfulness of the French captures pertained to the French consuls, who had been invested by the National Assembly with the powers of courts of admiralty. The United States replied that every nation possessed exclusive jurisdiction within its own territory, except so far as it might have yielded it by treaty; that the United States and France had, by their consular convention, conceded to each other's consuls jurisdiction in certain enumerated cases, but that they had not conceded to them the right to determine questions of prize. The United States, therefore, insisted that the fitting out and arming of vessels and the enlistment of citizens of the United States should cease; that privateers that had been unlawfully fitted out and armed in the United States should depart from and not reenter their jurisdiction; that captures made in the waters of the United States or by vessels unlawfully armed and equipped therein, should, when brought within the United States, be restored; and that the exercise of prize jurisdiction by the French consuls should be discontinued. Genet refused to heed these demands. "I wish, sir," he said, "that the Federal Government should observe, as far as in their power, the public engagements contracted by both nations, and that by this generous and prudent conduct, they will give at least to the world the example of a true neutrality, which does not consist in the cowardly abandonment of their friends in the moment when danger menaces them, but in adhering strictly, if they can do no better, to the obligations they have contracted with them."<sup>1</sup> He also expressed contempt for the opinions of the President, and questioned his authority.

On the 16th of August 1793 Morris was instructed  
 Genet's Recall. to ask for Genet's recall.<sup>2</sup> A request to this effect was made in an interview with M. Deforgues, then minister of foreign affairs, on the 8th of October. It was immediately granted; and on the 10th of October, M. Deforgues in a formal note, confirming what he had previously promised, declared that measures would be taken to show that "the proceedings and criminal maneuvers (*les demarches et les manœuvres criminelles*) of the Citizen Genet" were not authorized by his instructions.<sup>3</sup> His successor, M. Fauchet, demanded his arrest for punishment. This the United States refused "upon reasons of law and magnanimity."<sup>4</sup>

Genet maintained that he had acted in conformity  
 Genet's Defense. with his instructions; and when a copy of the instructions to Morris, directing the latter to ask for his recall, was, at the time of their dispatch, communicated to him, he declared that while "a despot may singly permit himself to demand from another despot the recall of his representative, and to order his expulsion in case of refusal, \* \* \* in a free state it can not be so, unless order

<sup>1</sup> Genet to Jefferson, June 8, 1793, Am. State Papers, For. Rel. I. 151.

<sup>2</sup> Am. State Papers, For. Rel. I. 167.

<sup>3</sup> Id. 372, 373, 375.

<sup>4</sup> Id. 709.

be entirely subverted." He therefore demanded that the President should, on the assembling of Congress, lay the whole matter before it for its consideration; and finally declared that if it was desired to have in the United States, "instead of a democratic ambassador, a minister of the *sacred régime*, complaisant, very mild, well disposed to pay his court to people in place, to conform himself blindly to whatsoever may flatter their views and their projects, and to prefer above all to the modest and sure society of good farmers, plain citizens, honest artisans, that of distinguished personages, who speculate so patriotically in the public funds, in the lands and paper of the state," he knew not whether the French republic could at that day find such a person in its bosom, but that he would at all events press it to sacrifice him without hesitation, if that injustice should seem to be useful.<sup>1</sup>

Genet's letters of recall did not reach the United States till February 1794. In the mean time violations of the sovereignty of the United States continued to occur; and toward the close of the year 1793 the government became cognizant of the fact that Genet had been engaged in promoting enterprises against the dominions of Spain. By a report of a committee of the House of Representatives of South Carolina of December 6, 1793, it appeared that various citizens of that State had received commissions from Genet authorizing them to raise and organize military forces in the United States; that he had instructed them to rendezvous in the State of Georgia, with a view to the invasion of the Spanish dominions, either alone, if opportunity should offer, or in conjunction with a French fleet, in the event of one appearing off the coasts of the Southern States, but that, from all the circumstances, it was probable that they must yield to any change of destination which he might point out to them. Genet, on learning of the publication of this report, hastened to deny that he had authorized the collecting of an armed force "in the territory of the United States," but admitted that, being "authorized by the French nation to deliver commissions" to such citizens of the United States as should "feel themselves animated with a desire of serving the best of causes," he had "granted them to several brave republicans of South Carolina," whose

<sup>1</sup> Genet to Jefferson, September 18, 1793, Am. State Papers, For. Rel. I. 172. In some remarks made at a meeting of the New York Historical Society, December 13, 1870, William Cullen Bryant, referring to Genet, said: "I knew the man, and remember him very vividly. Some forty-five years since he came occasionally to New York, where I saw him. He was a tall man, with a reddish wig and a full round voice, speaking English in a sort of oratorical manner, like a man making a speech, but very well for a Frenchman. He was a dreamer in some respects, and, I remember, had a plan for navigating the air in balloons. A pamphlet of his was published a little before the time I knew him entitled '*Aerial Navigation*,' illustrated by an engraving of a balloon shaped like a fish, propelled by sails and guided by a rudder, in which he maintained that man could navigate the air as well as he could navigate the ocean in a ship." It seems that at the time of which Mr. Bryant spoke Genet was living in Troy, in the State of New York. (The Struggle for Neutrality in America, an address by Charles Francis Adams, p. 51.)

intention appeared to be "to expatriate themselves, and to go among the independent Indian tribes, ancient friends and allies of France," in order to retaliate the injuries which the Spanish and the English had done by means of those savages.<sup>1</sup>

While the sovereignty of the United States was thus  
Decree of May 9, 1793. subjected to violation at home, their commerce at sea was falling a prey to belligerent depredations. The course of Great Britain has already been described.<sup>2</sup> On the 9th of May 1793, the National Convention of France passed a decree by which French ships of war and privateers were "authorized to seize and carry into the ports of the republic merchant vessels which are wholly or in part loaded with provisions, being neutral property, bound to an enemy's port, or having on board merchandise belonging to an enemy." Merchandise belonging to the enemy was declared to be "lawful prize, seizable for the profit of the captor;" but it was provided that "provisions, being neutral property," should be "paid for at the price they would have sold for at the port where they were bound." In either case an allowance was to be made for freight, and for the vessel's detention.<sup>3</sup> This decree, which was defended on the ground of a scarcity of provisions in France, was the first of the series of measures, French or British, by which neutral commerce was harassed and preyed upon down to the close of the Napoleonic wars. Morris immediately remonstrated against it. "I think," he said, in a spirit of prophecy, "I can foresee that, as to articles of food, the rules which the convention have now adopted will be followed with eagerness by her maritime enemies, and that henceforward commercial speculations will depend on the point of subsistence of the naval superiority between the belligerent powers." And, pointing to the fact that by the treaties between the United States and France enemies' goods were free from capture on board of neutral vessels, he asked that a supplementary decree be adopted for the purpose of exempting vessels of the United States from the operation of the decree.<sup>4</sup> Conformably to this request the National Convention, "desiring to preserve the union established between the French republic and the United States of America," on the 23d of May made a decree by which it was declared that, "conformably to the sixteenth article of the treaty concluded on the 16th of February 1778," American vessels were "not comprehended in the provisions of the decree of the 9th of May."<sup>5</sup> But long before the decree of May 9, 1793, complaints were made of "violences committed by French privateers on American vessels."<sup>6</sup> The executive authorities issued orders forbidding such depredations, but were "too feeble to prevent" them.<sup>7</sup> In one case, that of the American ship *Laurens*, the vessel was seized by a French privateer and taken into Havre, while

<sup>1</sup> Am. State Papers, For. Rel. I. 309, 311, 425; Pitkin's Political and Civil History of the United States, II. 377-385.

<sup>2</sup> Supra, Chap. X.

<sup>3</sup> Am. State Papers, For. Rel. I. 244.

<sup>4</sup> Morris to M. Le Brun, May 14, 1793, Am. State Papers, For. Rel. I. 364.

<sup>5</sup> Am. State Papers, For. Rel. I. 365.

<sup>6</sup> Morris to Le Brun, March 24, 1793, Am. State Papers, For. Rel. I. 358. See other complaints, Id. 359, 361, 367.

<sup>7</sup> Am. State Papers, For. Rel. I. 362, 367.



on a voyage from Charleston, South Carolina, to London, with a cargo of rice and indigo.<sup>1</sup> In order that this prize might be condemned, the National Convention on the 28th of May, at the instigation of the parties interested in the capture, repealed the decree of the 23d. Morris again remonstrated.

On the 1st of July the convention passed a new decree in the same terms as that of the 23d of May, exempting vessels of the United States from the provisions of the decree of the 9th of that month.<sup>2</sup> But on the 27th of July the decree of the 1st of the month was repealed, and numerous condemnations followed.<sup>3</sup> This act, by which the decree of the 9th of May was again put in force against American commerce, was defended by the minister of foreign affairs as a measure of retaliation against Great Britain.<sup>4</sup> Morris replied that the treaty of 1778, in derogating from the law of nations in favor of the merchandise of enemies of France in American bottoms, had also derogated from it to the prejudice of American merchandise found in the vessels of the enemy;<sup>5</sup> that at Philadelphia there had been witnessed the sale of a cargo, the property of an American citizen, which was taken by a French privateer on board of an English vessel; and that, under the decrees of the convention, the citizens of the United States did not have the advantages either of the treaty or the law of nations.<sup>6</sup> To his own government, Morris wrote: "The conduct of the convention respecting our treaty will have formed a useful reenforcement to those who would preserve our constitution. My efforts to support the treaty have been constant and persevering, although, in my private judgment, the breach of it on the part of our allies, by releasing us from the obligations it has imposed, could not but be useful under the present circumstances."<sup>7</sup> On the 5th of December 1793, Washington, in a message to Congress, said: "The representative and executive bodies of France have manifested generally a friendly attachment to this country, have given advantages to our commerce and navigation, and have made overtures for placing these advantages on permanent ground; a decree, however, of the National Assembly, subjecting vessels laden with provisions to be carried into their ports, and making enemy goods lawful prize in the vessel of a friend, contrary to our treaty, though revoked at one time as to the United States, has been since extended to their vessels also, as has been recently stated to us."<sup>8</sup>

<sup>1</sup> Am. State Papers, For. Rel. I. 361.

<sup>2</sup> Am. State Papers, For. Rel. I. 366, 367, 371.

<sup>3</sup> Am. State Papers, For. Rel. I. 312, 748.

<sup>4</sup> Am. State Papers, For. Rel. I. 376.

<sup>5</sup> Morris here refers to the "common law" rule that the fate of the goods depends on the character of the owner—that they are subject to confiscation if the owner is an enemy, but exempt if he is a neutral. We have seen that by Article XXIII. of the treaty of 1778 the goods of an enemy on board a neutral ship were free from confiscation. On the other hand, by Article XIV., neutral goods on board an enemy ship were declared to be confiscable.

<sup>6</sup> Am. State Papers, For. Rel. I. 313.

<sup>7</sup> Id. 373.

<sup>8</sup> Id. 141.

In a letter to Washington, of February 14, 1793,  
**Morris's Recall.** Morris said: "I will not speak of my own situation;

you will judge that it is far from pleasant. I could be popular, but that would be wrong. The different parties pass away like the shadow in a magic lantern, and to be well with any one of them would, in a very short period, become the cause of unquenchable hatred with the others."<sup>1</sup> With the progress of events Morris's situation did not become more agreeable, and at length he purchased a residence at Saint-port, about thirty miles from Paris, where he remained till his recall, paying such visits to Paris as the duties of his office rendered necessary. The authorities of the republic, to whom he had never been personally grateful,<sup>2</sup> took advantage of the request for Genet's recall to ask for his withdrawal. Under the circumstances this act of reciprocity was ungrudgingly conceded, but Washington did not fail to assure Morris that his confidence in and friendship and regard for him remained undiminished.<sup>3</sup>

As successor to Morris, Washington chose James  
**Appointment of** Monroe, who was then a member of the Senate from  
**Monroe.** Virginia.<sup>4</sup> Among the subjects with which Monroe was charged was that of compensation for the captures and spoliations of the property and injuries to the persons of American citizens by French cruisers and the demands of various American citizens for the payment of bills of exchange drawn in the West Indies.<sup>5</sup>

On his arrival in France Monroe committed to his secretary, Mr. Fulwar Skipwith, who had a provisional appointment as consul-general at Paris, the task of examining and endeavoring to settle the spoliation claims. On the 20th of November 1794 Mr. Skipwith made a report in which it appears that while he had settled 38 such claims, 132 were still pending, to say nothing of 103 claims growing out of an embargo in 1793 and 1794 at Bordeaux.<sup>6</sup> This report Mr. Monroe laid before the French Government, and as the result of his representations the committees of public safety, finance, and commerce and supplies on the 15th of November 1794 passed a new decree, by the fifth article of which the prohibition of neutral trade was confined to enemy merchandise, contraband, and articles destined for a place besieged, blockaded, or invested.<sup>7</sup>

On the 4th of January 1795 (14th Nivose, 3d year)  
**Decree of January 4,** the committee of public safety passed a new decree by  
 1795. which the decrees of May 9, 1793, and November 15, 1794, were modified so as to permit American vessels to transport enemies' merchandise, thus reestablishing as to American vessels, in accordance with the twenty-third article of the treaty of amity and commerce of 1778, the rule of free ships free goods.<sup>8</sup> The respite thus accorded to the neu-

<sup>1</sup> Am. State Papers, For. Rel. I. 396.

<sup>2</sup> Am. State Papers, For. Rel. I. 173.

<sup>3</sup> Am. State Papers, For. Rel. I. 409, 410, 412.

<sup>4</sup> Trescot's American Diplomatic History, 147-155.

<sup>5</sup> Am. State Papers, For. Rel. I. 668.

<sup>6</sup> Id. 749-760.

<sup>7</sup> Id. 752.

<sup>8</sup> Id. 642.

tral trade of the United States was not destined long to endure. It was prompted by the measures which the United States took to check the seizure of American vessels under the British orders in council of June 8, 1793, and subsequent dates.<sup>1</sup> But, after the proclamation of the Jay treaty in February 1796, the French authorities proceeded to take measures more extreme than any which they had previously adopted.

On the 9th of March, M. de la Croix laid before France's Complaints. Monroe a formal statement of France's complaints against the United States. They were classified under three heads: First, the inexecution of the treaties; second, the failure to punish an outrage committed on M. Fauchet, the French minister to the United States, and third, the treaty with Great Britain.

The complaint of failure to execute the treaties was substantiated by four distinct allegations:

1. That the courts of justice of the United States asserted cognizance of prizes made by the French privateers, notwithstanding the express clause in the treaty against it.

To this charge Monroe made the same answer as was given by Jefferson to Genet. (Supra, p. 2145.)

2. That English ships of war had, in violation of the seventeenth article of the treaty of amity and commerce, been admitted into the ports of the United States when they had made prizes of the French.

Monroe replied that the article in question forbade, not the entrance of enemies' ships of war, but only their entrance with their prizes, and that even in the latter case it merely required that they should be compelled to depart as soon as possible.

3. That the consular convention was ineffective because proper laws were not adopted to enable consuls to execute their decisions in disputes between Frenchmen or to reclaim deserting seamen.

As to the execution of the judgments of the consuls, Monroe said that as no definite objection was stated, he could not give a specific answer. As to the reclaiming of seamen, he referred to the act of Congress of April 14, 1792, as having provided suitable legal provisions for the execution of the convention.

4. That in August 1795 the captain of the corvette *Cassius* was, in violation of the nineteenth article of the treaty of amity and commerce, arrested and detained at Philadelphia, and that after his liberation the corvette itself was arrested on the pretext that it was eight months previously armed in that port.

Monroe answered that the article in question was not intended to secure personal immunity from punishment for crime, and that it appeared that the proceeding against the captain was a judicial one; and that, if the corvette was armed at Philadelphia, it was the duty of the government to seize it.

As to the outrage on M. Fauchet, which was committed by a British frigate in concert with a British consul, in boarding the packet on which the minister was embarked, opening his trunks and seizing his papers in the waters of the United States, Monroe answered that the exequatur of the consul was revoked, that supplies were ordered to be withheld

<sup>1</sup> Am. State Papers, For. Rel. I. 240. Supra, Chap. X.

from the frigate, that the frigate itself was ordered to depart from the waters of the United States, and that the minister of the United States in London had been directed to demand redress.

The third general complaint, that the United States had "knowingly and evidently sacrificed their connections with the republic and the most essential and least contested prerogatives of neutrality" by the treaty with England, was substantiated by two specific allegations:

1. That the United States had departed from the principles of the armed neutrality, and, to the detriment of their first allies, abandoned the limits of contraband by including in it articles for the construction and equipment of vessels.

Monroe answered that even in the former war, when the combination against England was most formidable, she refused to admit the principles of the armed neutrality; that it was impossible to obtain from her such a recognition now when many of the powers then opposing her were enlisted on her side and supporting her principles, and that the limits of contraband were not settled.

2. That the United States had by the eighteenth article of the treaty with England "consented to extend the denomination of contraband even to provisions."

By this article it was provided that, in view of the "difficulty of agreeing on the precise cases in which alone provisions and other articles not generally contraband may be regarded as such," such articles, whenever "so becoming contraband, according to the existing laws of nations," should not, if for that reason seized, be confiscated, but that they should be paid for at their full value, with a reasonable mercantile profit, together with the freight, and also the demurrage incident to the detention.

Monroe answered that this article left the law of nations on the subject precisely as it was before, and, according to the construction of the United States, required compensation to be paid even in cases in which provisions might be considered contraband by the law of nations.<sup>1</sup>

The discussion of the complaints of France was continued in the United States by M. Adet, the French minister, and Mr. Pickering, Secretary of State. In addition to the complaints that have been noticed, M. Adet charged:

1. That the Government of the United States made it a question "whether it should execute the treaties, or receive the agents of the rebel and proscribed princes."

Mr. Pickering, as Secretary of State, answered: "In 1791 the constitution formed by the constituent assembly was accepted by Louis XVI.; it was notified to the United States in March 1792. Congress desired the President to communicate to the King of the French their congratulations on the occasion. In August 1792 the King was suspended. In September royalty was abolished, and in January 1793 Louis XVI., tried and condemned by the convention, suffered death. Was it easy to keep pace with the rapid succession of revolutionary events? And was it unlawful for our government, under such circumstances, even to *deliberate*?"

2. That the President had issued "an insidious proclamation of neutrality."

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<sup>1</sup> Am. State Papers, For. Rel. I. 658, 659.

Pickering replied that the proclamation was designed to prevent citizens of the United States from violating the law of nations, was approved by Congress, and by "the great body of the citizens of the United States. And what was the general object of this proclamation? To preserve us in a state of peace. And have not the ministers of France declared that their government did not desire us to enter into the war? And how was peace to be observed? By an impartial neutrality. And was it not then the duty of the Chief Executive to proclaim this to our citizens, and to inform them what acts would be deemed departures from their neutral duties? This was done by the proclamation. To what in all this can the epithet *insidious* be applied? On the contrary is not the whole transaction stamped with *candor* and *good faith*?"

3. That the Secretary of the Treasury on the 4th of August 1793, by direction of the President, sent to the collectors of customs certain regulations which had been adopted for the purpose of preventing the arming of vessels by either belligerent in the United States.<sup>1</sup>

Answer was made that these regulations were framed for the purpose of insuring an impartial neutrality, and that the letter of the Secretary of the Treasury, which accompanied them, called particular attention to the seventeenth and twenty-second articles of the treaty of amity and commerce with France, lest any injury might result to her from inattention to them.

4. That the President submitted certain measures to Congress, with a view to have the courts invested with jurisdiction to punish offenses against the law of nations, and that Congress, on the 5th of June 1794, passed an act "for the punishment of certain crimes against the United States," under which French privateers and their prizes had been arrested.

In answer to this complaint, Mr. Pickering reviewed the cases in question, in order to show that they had been properly dealt with by the judicial tribunals.

5. That the Government of the United States had, by its "chicaneries, abandoned French privateers to its courts of justice."

Reply was made that the judges needed no defense against such an insinuation; that they might challenge the world for proof of the charge that they had not administered justice impartially.

6. That the United States had eluded the advances of France for renewing the treaty of commerce on a footing more favorable to both countries.

To this charge answer was made that it was impossible to negotiate with Genet; that the powers of his successor, Fauchet, if he possessed any to negotiate such a treaty, were not communicated to the United States; and that while the United States had exhibited every disposition to expedite the negotiation, Adet had held back.

7. That Jay's mission was "enveloped from its origin in the shadow of mystery, and covered with the veil of dissimulation."

Pickering answered that the United States had, ever since the peace, been endeavoring to negotiate a commercial treaty with Great Britain; that there were various questions at issue between the two countries on which it was proper to negotiate; and that there was no obligations to "unveil" the mission to anyone.

<sup>1</sup>Am. State Papers, For. Rel. I. 140.

8. That the English had been permitted to arm privateers in the ports of the United States, and to bring in and repair their prizes.

To this charge the reply was made that the United States had used every effort to prevent violations of neutrality by the English, while French privateers illegally armed in the United States continued on the coast, using the harbors to cruise from.

9. That the United States had permitted England to violate their neutrality by taking enemies' goods out of their ships.

Answer was made that it was not a violation of neutral rights to seize enemies' goods, the rule of free ship free goods resting on treaty.

10. That the United States allowed the French colonies to be declared in a state of blockade, and its citizens to be interdicted the right of trading with them.

Reply was made that the blockade was proclaimed as an actual one, and that it applied equally to all neutrals.

11. That the United States had permitted England to impress their seamen.

Answer was made that the United States had not assented to such impressment, but had resisted it, and that this resistance had been continued.

12. That the United States had ceased to permit the sale of French prizes in their ports.

Answer was made that such permission was originally granted as a favor, and that the indulgence was withdrawn when it came in conflict with a new and positive stipulation in the treaty with Great Britain, similar to that which France herself contracted with the British Government eight years after her treaty with the United States.

13. That the Government of the United States "suffered England, by insulting its neutrality, to interrupt its commerce with France."

Answer: "That our commerce has been interrupted by the armed vessels of England, and sometimes with circumstances of insult, we certainly shall not attempt to deny \* \* \*. It was because of those aggressions that preparations for war were commenced; and to demand satisfaction for them was the leading object of Mr. Jay's mission to London. Satisfaction was demanded; and the arrangements agreed on for rendering it are now in execution at London."

14. That the United States had exhibited "ingratitude" to France, and had failed to render the "succors" that might have been given without compromising the government.

Answer was made that while the United States were not disposed to question the importance of the aid actually derived from France, the exertions of France were made for the purpose of advancing her own interests and securing her own safety. But was it true that the United States had rendered no succors to France? In a letter to Mr. Morris of August 16, 1793, the Secretary of State had said: "We recollect with satisfaction, that, in the course of two years, by unceasing exertions, we paid up seven years' arrearages and installments of our debt to France, which the inefficacy of our first form of government had suffered to be accumulating; that, pressing on still to the entire fulfillment of our engagements, we have facilitated to Mr. Genet the effect of the installments of the present year, to enable him to send relief to his fellow-

citizens in France, threatened with famine; that, in the first moment of the insurrection which threatened the colony of St. Domingo, we stepped forward to their relief with arms and money, taking freely on ourselves the risk of unauthorized aid, and when delay would have been denial; . . . that we have given the exclusive admission to sell here the prizes made by France on her enemies in the present war, though unstipulated in our treaties, and unfounded in her own practice, or in that of other nations, as we believe." "To this detail," said Pickering, "I have to add, that, of all the loans and supplies received from France in the American war, amounting to nearly fifty-three millions of livres, the United States under their late government had been enabled to pay not two millions and a half of livres; that the present government, after paying up the arrearages and installments mentioned by Mr. Jefferson, has been continually anticipating the subsequent installments, until, in the year 1795, the whole of our debt to France was discharged, by anticipating the payment of eleven millions and a half of livres; no part of which would have become due until the second of September 1796, and then only one million and a half; the residue at subsequent periods; the last not until the year 1802."

While these discussions were progressing, the French Decree of July 2, 1796. Government adopted certain measures which prefigured the Berlin and Milan decrees of Napoleon. On the 1st of June 1796, the President of the United States approved an act of Congress, making it the duty of the Secretary of State to prepare a form which, when approved by the President, should be used as the form of a passport for American vessels.<sup>1</sup> This measure bore evidence of a desire to secure protection for such vessels by an amicable arrangement. On the other hand the French Directory on the 2d of July 1796, made the following decree:

"The Executive Directory, considering that, if it becomes the faith of the French nation to respect treaties or conventions which secure to the flags of some neutral or friendly powers commercial advantages, the result of which is to be common to the contracting powers, those same advantages, if they should turn to the benefit of our enemies, either through the weakness of our allies, or of neutrals, or through fear, through interested views, or through whatever motives, would, in fact, warrant the inexecution of the articles in which they were stipulated, decrees as follows:

"All neutral or allied powers shall, without delay, be notified that the flag of the French republic will treat neutral vessels, either as to confiscation, as to searches, or capture, in the same manner as they shall suffer the English to treat them."<sup>2</sup>

Under this decree widespread and indiscriminate deprivations were committed on the commerce of the United States. But it was supplemented by other decrees issued by special agents of the Directory in various places. On the 1st of August 1796 the special agents to the Windward Islands promulgated a decree declaring all vessels laden with articles "designated by

<sup>1</sup> 1 Stat. at L. 489.

<sup>2</sup> Am. State Papers, For. Rel. I. 577. See Davis's Notes, Treaty Volume, 1778-1887, p. 1300.

the name of contraband, as arms, instruments, munitions of war of what kind soever, horses and their furniture," should be seized and confiscated. This decree, besides taking no account of the destination of such articles, was enforced without regard to the forms of legal procedure.<sup>1</sup> By the special agents of the Directory to the Leeward Islands a decree was issued on the 27th of November 1796, directing the capture of "American vessels bound to English ports, or coming from the said ports," and their detention in the ports of the colony till otherwise ordered. This decree was understood to come within the intention of the decree of the Directory itself, and was, at least in some places, so construed.<sup>2</sup> On the 1st of February 1797, the special agents of the Directory to the Windward Islands issued another decree authorizing the capture and condemnation as prize of all neutral vessels destined to any of the Windward or Leeward islands held by the English and occupied and defended by the French emigrants.<sup>3</sup>

Against these decrees the United States protested in vain. For three years the relations between the two countries had remained in a state of uncertainty which it was impossible to preserve. The ratification of the Jay Treaty brought on a crisis which was sure sooner or later to come. By fixing the position of the United States as a neutral, it ended the irreconcilable conflict between the policy of actual, substantial neutrality, which the United States had from the beginning sought to maintain, and the policy—based partly on the treaties of 1778 as France interpreted them, and partly on considerations of sympathy—which Genet and his successors commended, but which could not long have retained even the name of neutrality. The French Government, besides issuing the decrees which have just been described, recalled its minister from the United States, and reduced the grade of the mission. Monroe was recalled, and in his place was sent Charles Cotesworth Pinckney, of South Carolina, a brother of Thomas Pinckney, who was then minister to England.<sup>4</sup> Pinckney was particularly charged to press the claims for spoiliations.<sup>5</sup> He arrived in Paris early in December, and just as the arrangements for his reception seemed to be complete the minister of foreign affairs informed Monroe that the Executive Directory had decided "that it will no longer recognize nor receive a minister plenipotentiary from the United States until after the redress of the grievances demanded of the American Government, and which the French republic has a right to expect."<sup>6</sup> The Directory refused to give Pinckney a permit to sojourn in Paris as a private stranger, and afterward sent him a notice to quit the territories of the republic. He then retired to Amsterdam to await developments.<sup>6</sup>

<sup>1</sup> Am. State Papers, For. Rel. I. 749, 759.

<sup>2</sup> Am. State Papers, For. Rel. I. 748-752.

<sup>3</sup> Trescot's American Diplomatic History, 162-171; Monroe's View of the Conduct of the Executive in Foreign Affairs.

<sup>4</sup> Am. State Papers For. Rel. I. 742.

<sup>5</sup> Am. State Papers, For. Rel. I. 746.

<sup>6</sup> Am. State Papers, For. Rel. II. 10.



Decree of March 2, 1797. On the 2d of March 1797, the Directory promulgated a new decree by which it was ordered that neutral

ships laden in whole or in part with enemy's property should be captured, and that all such property found on board should be deemed good prize. By a singular process of reasoning it further declared that by the operation of the most-favored-nation clause the treaty of amity and commerce of 1778 was to be considered as modified by the provisions of the Jay Treaty, in the following particulars:

1. That all enemy's property and all property "not sufficiently ascertained to be neutral, conveyed under American flags, shall be confiscated."

2. That to the list of contraband in the treaty of 1778 should be added articles used in arming and equipping vessels.

3. That Americans accepting commissions from the enemies of France, or serving as seamen in enemies' vessels, should be treated as pirates.

4. That every American ship should be deemed good prize, which should not have on board a crew list (*rôle d'équipage*) in the form prescribed by the model annexed to the treaty of amity and commerce of 1778, the observance of which was required by the twenty-fifth and twenty-seventh articles.<sup>1</sup>

The part of the foregoing decree that bore most hardly on American ships was that in regard to the documentation of vessels. By the twenty-fifth article of the treaty of amity and commerce of 1778, in order to avoid disputes, it was agreed that in case either of the contracting parties should be engaged in war, the vessels of the other should be furnished with sea letters or passports expressing the name, property, and bulk of the ship, and the name and residence of the master, according to the form annexed to the treaty, and also with certificates showing the character of the cargo and the places of its origin and destination. By the twenty-seventh article it was provided that, in case a ship should be visited, she should, on exhibition by the master of his passport concerning the property of the ship, made out according to the form annexed to the treaty, be at liberty to pursue her voyage free from molestation or search. By that form, the oath concerning the property of the ship was required to be annexed to the passport, but no other paper was required to be so annexed. By various acts of Congress provision was made for the documentation of vessels, including the matters referred to in the treaty of 1778.<sup>2</sup> Particular rules were established as to registry, ownership, tonnage, and crew list. When the decree of March 2, 1797, was issued, American vessels had for years been carrying the documents prescribed by the acts of Congress, and though the war had been in progress for four years no others had been required.<sup>3</sup> The decree, therefore, amounted to a declaration of general and summary confiscation of American vessels. Moreover, the old marine ordinances of France were revived and enforced with severity, both in Europe and the West Indies. Informalities in bills of lading, crew lists, or other papers were made a ground of condemnation, though the proofs of property were indubitable; and in many cases in the West Indies, when vessels were brought to

<sup>1</sup> Am. State Papers, For. Rel. II. 12, 30, 180.

<sup>2</sup> 1 Stats. at L. 31, 53, 288, 289, 290.

<sup>3</sup> Am. State Papers, For. Rel. II. 180, 302.

trial, they and their cargoes were condemned without admitting the owners or their agents to make defense.<sup>1</sup> In a report of February 28, 1798, Pickering summarized the depredations on American commerce as follows: (1) Spoilation and maltreatment of their vessels at sea by French ships of war and privateers. (2) A distressing and long-continued embargo on their vessels at Bordeaux in the years 1793-1794. (3) The nonpayment of bills and other evidences of debts due drawn by the colonial administrations in the West Indies. (4) The seizure or forced sales of the cargoes of vessels, and the appropriation of them to public use, without paying for them, or paying inadequately, or delaying payment for a great length of time. (5) The nonperformance of contracts made by the agents of the government for supplies. (6) The condemnation of vessels and cargoes under such of the marine ordinances of France as were incompatible with the treaties subsisting between the two countries. (7) Captures, detentions, and condemnations under various decrees which have been described.<sup>2</sup>

At the opening of the first session of the Fifth Commission of Pinckney, *gross*, on May 16, 1797, President Adams referred to the Marshall, and Gerry. state of the relations with France, and recommended the consideration of effectual measures of defense. In particular he adverted to the depredations on American commerce, in violation of the treaty of amity and commerce of 1778, and to the speech made by Barras, the president of the Directory, when Monroe, on the 30th of December 1796 took his formal leave.<sup>3</sup> Desirous, however, of trying all possible means of conciliation, President Adams, on the 31st of May 1797, nomi-

<sup>1</sup> Am. State Papers, For. Rel. II. 28-29.

<sup>2</sup> Am. State Papers, For. Rel. I. 748.

<sup>3</sup> Barras said: "By presenting to-day your letters of recall to the Executive Directory, you offer to Europe a very strange spectacle. France, rich in her liberty, surrounded by a train of victories, and strong in the esteem of her allies, will not stoop to calculate the consequences of the condescension of the American Government to the wishes of its former tyrants. The French republic expects, however, that the successors of Columbus, Raleigh, and Penn, always proud of their liberty, will never forget that they owe it to France. They will weigh, in their wisdom, the magnanimous friendship of the French people with the crafty caresses of certain perfidious persons who meditate to bring them again under their former yoke. Assure the good American people, sir, that like them we adore liberty; that they will always possess our esteem; and that they will find in the French people that republican generosity which knows how to grant peace, as well as to cause its sovereignty to be respected. As to you, Mr. Minister Plenipotentiary, you have combatted for principles; you have known the true interests of your country: depart with our regret. In you we give up a representative to America, and retain the remembrance of the citizen whose personal qualities did honor to that title." (Am. State Paper For. Rel. II. 12.) "The moment this speech was concluded, the Directory, accompanied by the diplomatic corps, passed into the audience hall to receive from an *aid-de-camp* of Bonaparte the four Austrian colors taken at the battle of Arcola. The diplomatic corps may therefore be presumed to have witnessed this indignity." (Davis's Notes, Treaty Vol., 1776-1887, p. 1302.)

nated to the Senate Charles Cotesworth Pinckney, Francis Dana, and John Marshall as envoys extraordinary and ministers plenipotentiary to the French republic.<sup>1</sup> Dana having declined the appointment, Elbridge Gerry was nominated in his place, and on the 13th of July the three commissioners were invested with full power to treat on all the differences between the two countries.<sup>2</sup> They arrived in Paris on the evening of the 4th of October. On the 8th they were unofficially received by Talleyrand, the minister of foreign affairs, to whom they gave a copy of their letter of credence. Talleyrand directed cards to be sent them in order that they might remain in Paris, but informed them that it would be necessary for him to consult further with the Directory before formally receiving them. It was subsequently intimated, through his private secretary, that they could not have a public audience of the Directory until their negotiations were concluded.

Meanwhile, they were waited upon by three men who The X, Y, Z, Episode. came sometimes singly and sometimes together, and who professed to represent Talleyrand and the Directory. These persons are known in the correspondence as X, Y, and Z. The first approach was made by W, who called on Pinckney and informed him that X was a gentleman of credit and reputation, in whom great reliance might be placed. On the evening of the same day X called, and professing to speak for Talleyrand, whom he represented as desirous of effecting a conciliation with America, suggested confidentially a plan for that purpose. It was represented that two members of the Directory were exceedingly irritated at some passages in the President's speech of May 16, 1797, and that these passages would need to be softened; that a sum of money, to be at the disposal of Talleyrand, would be required as a *douceur* for the ministry, except Merlin, the minister of justice, who was already making enough from the condemnation of vessels; and that a loan to the government would also be insisted on. As the amount of the *douceur*, X mentioned the sum of 1,200,000 livres, or about 50,000 pounds sterling. Pinckney answered that he and his colleagues had been treated with great slight and disrespect; that they earnestly wished for peace and reconciliation with France, and had been intrusted with very great powers to obtain these ends on honorable terms; but that, with regard to the propositions which had been made to him, he could not even consider them before communicating with his colleagues. It was subsequently arranged that X should be presented to all the American plenipotentiaries, and that he should reduce his propositions to writing. This X agreed to do, saying that his communication was not immediately with Talleyrand, but through another gentleman, in whom Talleyrand had great confidence. This gentleman proved to be Y. On the evening of the 19th of October, X called upon the plenipotentiaries and presented in writing the propositions which he had already made orally. On the evening of the 20th X and Y called together, the latter being introduced as a confidential friend of Talleyrand. Y dilated on the resentment produced by the President's speech, and said he would not disguise the fact that after they had afforded satisfaction on that point, they must pay money, "a great deal of money." In

<sup>1</sup> Am. State Papers, For. Rel. II. 19.

<sup>2</sup> Am. State Papers, For. Rel. II. 153.

so saying he referred to the subject of a loan. Concerning the 1,200,000 livres little was said, it being understood that this sum was required for the officers of the government, and therefore needed no further explanation. In an interview on the following day, Y, who represented that he had spent the morning with Talleyrand, intimated as a "private individual" the opinion that the determination of the Directory in regard to the President's speech might be changed by a loan. He said there were 32,000,000 florins of Dutch inscription, worth 10 shillings in the pound, which might be assigned to the United States at 20 shillings in the pound; that, after peace was concluded, the Dutch Government would repay the money; and that the practical effect of the measure would be an advance of 32,000,000 to France, on the credit of Holland. The plenipotentiaries inquired whether the *douceur* to the Directory must be in addition to this sum. Y answered in the affirmative. After consultation the plenipotentiaries replied that the proposition of a loan was not within the limits of their instructions, but that one of their number would forthwith embark for America to consult the Government on the subject, provided the Directory would suspend proceedings in respect of captured American vessels. At this reply Y exhibited disappointment. He said the plenipotentiaries had treated the money part of the proposition as if it had proceeded from the Directory, whereas in fact it was only a suggestion from himself, as a means of avoiding "the painful acknowledgment" which the Directory had determined to demand of them. The plenipotentiaries answered that they understood the matter perfectly; that they knew the proposition was in form to be theirs, but that it came substantially from the minister; that it was for the Directory to determine what course its own honor and the interest of France required it to pursue, and for them to guard the interest and honor of their own country. Y declared that they certainly would not be received, and "seemed to shudder at the consequences."<sup>1</sup>

After further conference with the French intermediaries, the American plenipotentiaries informed them that they considered it degrading to their country to carry on further indirect intercourse, and that they had determined to receive no further propositions unless the persons who bore them had authority to treat.<sup>2</sup> On the 11th of November they addressed to Talleyrand a formal letter, in which they reminded him of their unofficial interview of the 6th of October, and asked to be informed of the decision of the Directory with regard to their reception. To this letter they received no answer, and about the middle of December X and Y sought to renew their intercourse. "On the 20th of December," says Pinckney, "a lady, who is well acquainted with M. Talleyrand, expressed to me her concern that we were still in so unsettled a situation; 'but,' adds she, 'why will you not lend us money?'" She assured Pinckney that if they remained six months longer they would not advance a single step in their negotiation without a loan. Pinckney replied that if such was the case they might as well go away at once.<sup>3</sup>

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<sup>1</sup> Am. State Papers, For. Rel. II. 158-160.

<sup>2</sup> Am. State Papers, For. Rel. II. 164.

<sup>3</sup> Am. State Papers, For. Rel. II. 166, 167. After the envoys' reports of these transactions were made public in the United States, they were republished in the London Gazette. Talleyrand, having seen a copy, on the

On the 18th of January 1798 the Directory issued a Decree of January 17, new decree, by which it was declared that every vessel found at sea loaded in whole or in part with merchandise the production of England or her possessions, should be good prize, whoever the owner of the goods or merchandise might be; and that every foreign vessel which in the course of her voyage should have entered an English port, should not be admitted into the ports of France except in cases of necessity.<sup>1</sup> On the 28th of January the American plenipotentiaries, though still unrecognized, addressed an elaborate communication to Talleyrand, in which they reviewed the questions in controversy between the two governments, and drew particular attention to the spoils of American commerce.<sup>2</sup>

On the 2d of March, having intimated that it would be improper for them to remain longer in France under existing conditions, they were admitted by Talleyrand to an interview. Talleyrand soon introduced the kindred subjects of the speech of the President and the negotiation of a loan. His observations led Pinckney to remark that the propositions which he suggested appeared to be substantially the same as those made by X and Y. The plenipotentiaries declared that they had no power to agree to a loan; and on the 18th of March Talleyrand made a formal reply to their note. In this reply he repeated the complaints concerning the interference with French prizes in the United States, and the admission of enemies' vessels to American ports, after they had captured property or ships belonging to French citizens; but he laid most stress on the questions raised by the Jay Treaty. After reviewing these matters at length he declared that the Executive Directory was "disposed to treat with that one of the three [plenipotentiaries] whose opinions, presumed to be more impartial, promise, in the course of the explanations, more of that reciprocal confidence which is indispensable."<sup>3</sup> The plenipotentiary thus referred to was Gerry. On the 3d of April the three envoys, replying to Talleyrand's communications stated that none of them was authorized to take upon himself alone a negotiation.<sup>4</sup> But, although Pinckney and Marshall left Paris without further delay, Gerry remained behind, alleging in justification of his course that the Directory wished him to stay, and that his departure against its

30th of May 1798 wrote to Gerry, declaring that intriguers had profited by the "insulated position" in which the envoys had kept themselves to make propositions the object of which evidently was to deceive them. He demanded to know the names of X, Y, and Z, and of the woman who was described as holding conversations with Pinckney. Gerry gave him the names of X, Y, and Z. The name of the lady he said he could not give, as she had not made any political communications to him. Y was a Mr. Bellamy; Z, a Mr. Hauteval. The name of X was given, but was not published. It is preserved in the Department of State. Z avowed himself. (Am. State Papers, For. Rel. II. 210, 211, 229.)

<sup>1</sup> Am. State Papers, For. Rel. II. 182.

<sup>2</sup> Id. 169-182.

<sup>3</sup> Id. 188, 191.

<sup>4</sup> Id. 191-199.

wishes might bring on an immediate rupture.<sup>1</sup> He continued in Paris till the end of July 1798. His conferences with Talleyrand produced no result; and he was rebuked by his government, and directed to consider himself as positively recalled.<sup>2</sup>

As the reports of the envoys were from time to time received, President Adams promptly communicated them to Congress. On the 14th of June 1798 the correspondence with Talleyrand was received, and on the 18th of the month it was communicated to Congress without comment. On the 23d of the preceding March the envoys had been instructed to demand their passports and return to the United States, if, on the receipt of the instructions, persons with full and equal powers should not have been authorized to treat with them. The arrival of Marshall in the United States conveyed the intelligence that the envoys had been compelled to anticipate their instructions. On the 21st of June the President congratulated Congress on Marshall's arrival, and declared, "I will never send another minister to France without assurances that he will be received, respected, and honored, as the representative of a great, free, powerful, and independent nation."<sup>3</sup> The news of the manner in which the envoys had been treated, and of the character of the proposals with which they had been received, created a feeling of great indignation. Measures to pit the country in a condition for war were immediately adopted. On June 13, 1798, before the reception of the correspondence between Talleyrand and the envoys, the President approved an act to suspend commercial intercourse between the United States and France and her dependencies.<sup>4</sup> On the 22d of June, acts were passed to increase the naval armament of the United States, and to amend an act of the 28th of May, authorizing the President to raise a provisional army.<sup>5</sup> In quick-succession other acts were passed to authorize the arrest and expulsion of aliens;<sup>6</sup> to authorize the defense of merchant vessels of the United States against French depredations;<sup>7</sup> to protect the commerce and coasts of the United States;<sup>8</sup> to augment the army of the United States;<sup>9</sup> and to enable the President to borrow money.<sup>10</sup> On the 7th of July the President approved an act by which it was declared that, as the treaties between the two countries had been repeatedly violated by France, the just claims of the United States for reparation refused, and their attempts to negotiate an amicable adjustment repelled with indignity; and as there was still being pursued against the United States, under the authority of the French Government, a system of predatory violence, in conflict with the treaties and hostile to the rights of a free and independent nation, the United States were "of right freed and exonerated from the stipulations of the treaties, and of the con-

<sup>1</sup> Am. State Papers, For. Rel. II. 199.

<sup>2</sup> Am. State Papers, For. Rel. II. 204.

<sup>3</sup> 1 Stats. at L. 565.

<sup>4</sup> Id. 558, 569.

<sup>5</sup> Id. 570, 577.

<sup>6</sup> Id. 572.

<sup>7</sup> Id. 574.

<sup>8</sup> Id. 604.

<sup>9</sup> Id. 607.

sular convention," and that these compacts should "not henceforth be regarded as legally obligatory on the government or citizens of the United States."<sup>1</sup> At the next session of Congress the commercial intercourse between the United States and France was further suspended; <sup>2</sup> authority was given to the President to exchange or send away French citizens who had been or might be captured and brought into the United States; <sup>3</sup> provision was made for augmenting the army; and various other acts were adopted in relation to the hostilities which Congress had authorized. The command in chief of the army was offered to Washington and accepted by him. On the 21st of August 1798 the Attorney-General of the United States advised the Secretary of State that, taking into consideration the acts of the French republic toward the United States, and the legislation adopted by Congress at its preceding session, he was of opinion that there not only existed an actual maritime war between France and the United States, but a maritime war authorized by both nations.<sup>4</sup>

The storm which the treatment of the envoys raised *Talleyrand's Overture*. in America doubtless was more violent than Talleyrand had anticipated; and when he heard of the declaration of President Adams and of the measures adopted by Congress, he sought to restore diplomatic relations. To that end he instructed the French secretary of legation at the Hague to inform Mr. Vane Murray, then minister of the United States at that capital, in the words of President Adams, that "whatever plenipotentiary the Government of the United States might send to France, in order to terminate the existing differences between the two countries, he would undoubtedly be received with the respect due to the representative of a free, independent, and powerful nation."<sup>4</sup>

On receiving this overture President Adams, on the 25th of February 1799, nominated to the Senate Chief Justice Ellsworth, Patrick Henry, and Mr. Murray as envoys extraordinary and ministers plenipotentiary to the French republic, with full power to discuss and settle all controversies between the two governments. Mr. Henry being unable to accept the position by reason of advancing age, Governor William R. Davie, of North Carolina, was substituted in his place.

The instructions of these plenipotentiaries were signed by Timothy Pickering, as Secretary of State, and bore date of the 22d of October 1798.<sup>5</sup> They required, as the indispensable condition of a new treaty, a stipulation for compensation for "all captures and condemnations" contrary to the law of nations and to the treaty of amity and commerce of 1778, while the latter "remained in force," and especially for such as were "made and pronounced—

"1. Because the vessel's lading, or any part thereof, consisted of provisions or merchandise coming from England or her possessions.

<sup>1</sup> 1 Stats. at L. 613.

<sup>2</sup> 1 Stats. at L. 624.

<sup>3</sup> Opinions of the Attorneys-General, I. 84.

<sup>4</sup> Am. State Papers, For. Rel. II. 242.

<sup>5</sup> Id. 306.

"2. Because the vessels were not provided with the *rôles d'équipage* prescribed by the laws of France, and which, it has been pretended, were also required by treaty.

"3. Because sea letters or other papers were wanting, or said to be wanting, when the property shall have been, or shall be, admitted or proved to be American \* \* \*.

"4. When the owners, masters, or supercargoes shall have been refused a hearing or placed in situations rendering their presence at the trial impracticable.

"5. When the vessels or other property captured shall have been sold, or otherwise disposed of, without a regular trial and condemnation."

If a preliminary acknowledgment of these claims should be secured, the envoys were instructed that it would be necessary, for the purpose of examining and adjusting "all the claims" of citizens of the United States, to provide for the appointment of a board of commissioners, who, besides determining claims for captures and condemnations, should also take cognizance of the following claims:

I. Of citizens of the United States—

1. For "merchandise, or other property, seized by the French in their own ports or elsewhere, and not comprehended under the head of captures; and for their vessels arbitrarily and unreasonably detained in French ports."
2. For "sums due \* \* \* by contracts with the French Government or its agents."

II. Of citizens of France, for injuries occasioned by "infringements of the treaty of amity and commerce by the United States, or their citizens."

III. National claims—

1. Of "the United States, as distinguished from those of their citizens, for injuries received from the French republic, or its citizens."
2. Of France, for injuries occasioned by infringements of the treaty of amity and commerce.

"If, however," said the instructions, "the French Government should desire to waive its national claims, you may do the like on the part of the United States. Doubtless the claims of the latter would exceed those of the former; but, to avoid multiplying subjects of dispute, and because *national* claims may probably be less definite than those of *individuals*, and consequently more difficult to adjust, *national* claims may, on both sides, be relinquished."

Minute directions were given as to matters of commerce and navigation, and in conclusion the envoys were instructed that the following points were "to be considered as ultimated:"

1. That a board of commissioners be established to hear and determine the claims of citizens of the United States arising from the causes previously specified, and that France be bound to pay the sums awarded.
2. That the treaties of 1778 and the consular convention of 1788 be not revived in whole or in part, but that all the engagements to which the United States were to become parties be specified in a new treaty.
3. That no guaranty of any part of the French dominions be stipulated, nor any engagement made in the nature of an alliance.
4. That no aid or loan be promised in any form whatever.



5. That no engagement be made inconsistent with the obligations of any prior treaty, and that, if cogent reasons should appear for renewing in substance the seventeenth and twenty-second articles of the treaty of amity and commerce of 1778, it must be done with the explicit declaration that they should not be construed so as to derogate from the twenty-fourth and twenty-fifth articles of the Jay Treaty.
6. That no powers be granted to consuls or others incompatible with the complete sovereignty of the United States in matters of policy, commerce, and government.
7. That the duration of the proposed treaty be limited to twelve years from the exchange of ratifications.

Messrs. Ellsworth and Davie sailed from Newport, Rhode Island, on the 3d of November 1799, agreeing to touch at Lisbon before making any port in France.

When, on the 27th of November, they arrived at the Portuguese capital, news had just been received there of the revolution at Paris of the 18th Brumaire (10th November), by which the Directory was overthrown. They reached Paris on the 2d of March 1800, the day after the arrival of Mr. Murray from The Hague. They found Bonaparte reigning as first consul. He promptly granted the envoys an audience, and appointed MM. Joseph Bonaparte, Fleurieu, and Roederer as plenipotentiaries to negotiate with them.<sup>1</sup>

The commencement of the negotiations was delayed by the indisposition of Joseph Bonaparte. On the 2d

of April, however, the plenipotentiaries met and exchanged their powers; but as those of the French plenipotentiaries were not considered by their American colleagues sufficiently full and explicit, the French Government furnished its representatives with new ones.<sup>2</sup> This preliminary adjusted, the American plenipotentiaries proposed first "to ascertain and discharge the equitable claims of the citizens of either nation upon the other, whether founded on contract, treaty, or law of nations," and then to take up questions of commercial intercourse. The French plenipotentiaries expressed the opinion that "the first object should be to determine the rules, and the mode of procedure, for the valuation of those injuries for which the two nations, respectively, may have demands against each other, whether these demands are founded on national injuries or individual claims;" and that the "second object" was "to insure the execution of the treaties of friendship and commerce, now existing between the two nations, and the accomplishment of those views of reciprocal advantage which first dictated them."

The American plenipotentiaries, while suggesting the expediency of a mutual relinquishment of national claims, intimated that the discussion of such claims might conveniently follow the arrangement of the individual claims; and, in accordance with this view, they presented on the 17th of April a draft of articles for the adjustment of the claims of individuals. In this draft it was provided that, in determining questions of capture or condemnation, the commissioners should "decide the claims in question according

<sup>1</sup> Am. State Papers, For. Rel. II. 307-311.

<sup>2</sup> Id. 312-314.

to the original merits of the several cases, and to justice, equity, and the law of nations; and in all cases of complaint existing prior to the 7th of July 1798, according to the treaties and consular convention then existing between France and the United States."<sup>1</sup> The French plenipotentiaries on the 6th of May replied that the proposal of their American colleagues had "a tendency to remove the obstacles" which lay in the way of the accomplishment of what both nations desired, and that they would have seized the present moment to develop their views respecting the "various interpretations" which had been "given to the treaties," had they "not been struck with an interpretation of which they can conceive neither the cause nor the object, and which therefore seems to require explanation." "The ministers plenipotentiary of France are not aware," they declared, "of any reason which can authorize a distinction between the time prior to the 7th of July 1798 and the time subsequent to that date, in order to apply the stipulations of the treaties to the damages which have arisen during the first period, and only the principles of the laws of nations to those which have occurred during the second."<sup>2</sup> The American plenipotentiaries answered that the distinction was based on the fact that it "was not till after the treaty of amity and commerce of February 1778 had been violated to a great extent on the part of the French republic, nor till after explanations and an amicable adjustment sought by the United States had been refused, that they did on the 7th of July 1798 by a solemn public act, declare that they were free and exonerated from the treaties and consular convention which had been entered into between them and France."<sup>3</sup>

The issue thus made as to the treaties was the subject of numerous fruitless conferences. At length on the 26th of August the French plenipotentiaries formally defined the position of their government thus:

1. That it could not admit that the treaties had been annulled, either by the single act of abrogation on the part of the United States, or by "the misunderstanding" which had for some time existed between the two countries, but which had "not constituted a state of war, at least on the part of France." On this basis France was ready "to stipulate a full and entire recognition of the treaties, and a reciprocal promise of indemnities for the damages resulting, on the part of either, from their infraction." But—

2. If the American plenipotentiaries were unable to recognize the validity of the treaties, France would acquiesce in their nullity, with the understanding that the act of the United States, by which their abrogation was declared, was "an unequivocal provocation to war;" that the "hostile acts" by which the provocation was followed "were nothing less than war;" and that the new treaty between the two countries should be "preceded by a treaty of peace." "If," said the French plenipotentiaries in conclusion, "the correctness of these observations is admitted, it would seem that the two governments ought to be occupied no longer with their

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<sup>1</sup> Am. State Papers, For. Rel. II. 317.

<sup>2</sup> Id. 319.

<sup>3</sup> Id. 320.

respective losses; the rights of war acknowledge no obligation to repair its ravages."<sup>1</sup>

**Treaties and Indemnities Postponed.** Various propositions were made on either side with a view to an accommodation; but, as the French plenipotentiaries refused to separate the question of indemnities for captures and condemnations from that of the treaties, and the American plenipotentiaries had no authority either to recognize the treaties or to abandon the claims, an agreement was impossible. It thus became necessary to postpone the subject, or else to abandon the negotiations, which virtually meant war. The American plenipotentiaries assumed the responsibility of choosing the former alternative, and on the 30th of September 1800 signed a convention.

**Convention of September 30, 1800; Art. II.** By the second article of this convention it was declared that the ministers plenipotentiary of the contracting parties, being unable to agree respecting the treaty of alliance and of amity and commerce of 1778, and the consular convention of 1788, or "upon the indemnities mutually due or claimed, the parties will negotiate on these subjects at a convenient time, and until they may have agreed upon these points the said treaties and conventions shall have no operation."

**Debts and Captured Property.** Besides this article in relation to the treaties and indemnities, the following provisions of the convention may be noticed:

1. That all public ships taken by either party from the other should be restored (Article III.).

2. That property captured, but not definitively condemned, or which might be captured before the exchange of ratifications, should be mutually restored on certain proofs of ownership (Article IV.).

3. That "debts contracted by one of the two nations with individuals of the other, or by the individuals of the one with the individuals of the other, shall be paid, or the payment may be prosecuted, in the same manner as if there had been no misunderstanding between the two states," but that this clause should "not extend to indemnities claimed on account of captures or confiscations" (Article V.).

**Other Stipulations.** The convention also provided that free ships should make free goods, but that the enemy's flag should render the goods of a neutral liable to confiscation, and that prizes should be adjudicated only by the established prize courts of the country. Article XVIII. of the treaty of amity and commerce of 1778 was renewed, with the proviso that its stipulations should not extend beyond the privileges of the most favored nation. No limit was set to the operation of the convention. With this exception, and that of compensation for captures and condemnations, it substantially conformed to Pickering's ultimata.

The Senate approved the convention with the proviso **Expunction of Article II.** that Article II. should be "expunged," and the duration of the convention limited to eight years from the exchange of ratifications. The convention as thus amended was returned to

<sup>1</sup> Am. State Papers, For. Rel. II. 332.

Paris with a view to the exchange of ratifications.<sup>1</sup> The French ministers refused to agree to an unconditional suppression of the second article, but insisted that, if it was stricken out, "the reciprocal pretensions" to which it related "should not be brought forward at any future period."<sup>2</sup> Murray being without authority to enter into an engagement to this effect, Bonaparte, as first consul, ratifying the convention in the name of the French people, inserted in his act of ratification the proviso, that by the expunction of the second article "the two states renounce the respective pretensions, which are the object of the said article." The ratifications were exchanged at Paris on the 31st of July 1801. When the convention was sent back to the United States, the President, in view of the form of the French ratification, deemed it "most safe, as a precedent, to ask anew the sanction of the Senate to the instrument with that ingrelient," though he did not regard "the declaratory clause as more than a legitimate inference from the rejection by the Senate of the second article."<sup>3</sup> The Senate, on the 19th of December, declared that it considered the convention "as fully ratified," and returned it to the President for promulgation.<sup>4</sup> It was proclaimed on the 21st of December.<sup>5</sup>

**Execution of the Convention.**

In returning the convention as amended by the Senate to the envoys in Paris, the Acting Secretary of State in March 1801 said: "We are carrying the convention into execution in all its parts. All hostilities on the sea have been forbidden; our vessels are returning into port; the prisoners in our possession are in course of delivery to M. Letombe, former consul of France; he is notified that all those officers may resume their functions; commercial intercourse is restored; a number of our vessels actually cleared out and departed for France, and orders given for the restitution of vessels under the third article of the convention."<sup>6</sup> On the 3d of January, however, Talleyrand had instructed the Council of Prizes "to adjourn to an indefinite period all decisions upon every kind of property seized under the flag of the United States," though he promised, as soon as the convention should be ratified on both sides, "to urge forward a decree of the consuls, which shall replevy for the Americans all the prizes restitution of which has been engaged for."<sup>7</sup>

**Nonexecution by France.**

The restitutions claimed by the United States, as defined by Madison, embraced (1) cases of capture in which there had been no judicial proceedings; (2) cases carried before the French tribunals, but not definitively decided on the 30th of September 1800, and (3) captures made subsequently to that day.<sup>1</sup> On the 10th of December 1801, Chancellor Robert R. Livingston, who had become minister plenipotentiary to France, reported that "the Council of Prizes were still condemning in the very face of the treaty," and that the

<sup>1</sup> Am. State Papers, For. Rel. VI. 148.

<sup>2</sup> Am. State Papers, For. Rel. VI. 144-145.

<sup>3</sup> Am. State Papers, For. Rel. VI. 155.

<sup>4</sup> Am. State Papers, For. Rel. II. 345.

<sup>5</sup> Am. State Papers, For. Rel. VI. 149.

<sup>6</sup> Id. 151.

<sup>7</sup> Id. 154.

debts due to American citizens remained unpaid. In communications subsequently made to the French Government he complained (1) that the government had omitted to take proper measures for the payment of debts; (2) that it refused to make compensation for vessels detained in French ports under general embargoes, or under other measures looking to the application of the cargo for the government's advantage; (3) that it refused to restore property directly, without the intervention of the Council of Prizes, whose dilatory proceedings were ruinous to claimants; (4) that the Council of Prizes condemned property on grounds incompatible with the provisions of the fourth article of the convention; (5) that, even where a vessel was acquitted, the Council of Prizes, instead of awarding costs and damages or even restoring the thing captured in the same condition as when taken, directed it to be restored as it was at the date of restitution, and charged the costs of detention, storage, and other expenditures to the captured, and (6) that the government refused to restore captures made prior to September 30, 1800, even where they had not been finally decided on, on the ground that they fell under the second article of the convention. The last complaint Livingston afterward withdrew, saying that it could not be supported by the convention.<sup>1</sup>

The negotiations in relation to claims soon underwent a great change. On the 1st of October 1800, the day after the signature of the convention between the United States and France, a treaty was concluded between France and Spain at St. Ildefonso, by which Louisiana was retroceded to the former power. Though this treaty was kept secret and its existence persistently denied, within a year after its conclusion rumors of the transaction reached the United States. When Livingston arrived in France in November 1801 he was privately assured that both Louisiana and the Floridas had been purchased by France. Talleyrand explicitly denied that anything had been concluded.<sup>2</sup> On the 20th of November, however, Rufus King sent to Madison from London a copy of a treaty between France and Spain, signed at Madrid on the 21st of the preceding March, by which the retrocession of Louisiana was explicitly declared, and the details of the transaction fully set forth.<sup>3</sup>

When Livingston became convinced that the retrocession had been made, he was not slow to perceive its possible effects on the relations between France and the United States, and he set himself to work to obtain the cession of New Orleans to the United States. As an argument for this purpose he pressed the American claims. Tested either by the advantages received by the debtor, or by the loss sustained by the creditor, no claims could, he declared, stand on stronger ground than those of American citizens against France. They were "chiefly founded upon contracts, for articles of the first necessity, furnished \* \* \* when the want of them would have plunged France in the utmost distress." Moreover it was, he said, to be remembered that while Great Britain was "of late very amply compensating by full payment of principal, interest, and damages, for any illegal

<sup>1</sup> Am. State Papers, For. Rel. VI. 156, 157, 159, 161, 164.

<sup>2</sup> Adams's History of the United States, I. 409.

<sup>3</sup> Am. State Papers, For. Rel. II. 511.

captures made during the war, compensation for those which fell under the description in France has in a great measure been given up by the late convention, and that due for the remaining few, which ought to have been satisfied by that treaty, has been eluded by some very extraordinary decisions of the Council of Prizes, or by that delay which all the claims of American citizens have hitherto met with."<sup>1</sup>

In January 1803 Monroe was joined with Livingston in the mission to France.<sup>2</sup> Before he reached Paris, Bonaparte, who desired funds for the approaching war with Great Britain, had determined to sell not only New Orleans, but the whole of Louisiana. Monroe arrived in time to participate in the final negotiations, which were protracted by discussions as to the price to be paid for the cession.<sup>3</sup> On the 30th of April 1803 a "treaty" and two "conventions" were signed. The treaty ceded Louisiana to the United States. One of the conventions provided for the payment by the United States to France of the sum of 60,000,000 francs; the other, for the payment by the United States of "debts" due by France to citizens of the United States, to an amount not to exceed the sum of 20,000,000 francs.

It is with the latter convention that we are here

concerned. It provided:

1. That "debts due by France to citizens of the United States," contracted before September 30, 1800, should be paid, with interest at 6 per cent, to commence from the period when the accounts and vouchers were presented to the French Government (Article I.).

2. That the debts thus provided for were "those whose result is comprised in the conjectural note annexed to the present convention," but that claims comprised in the note but falling within any specific exception in the convention should not be admitted (Article II.).

3. That the preceding articles should comprehend no debts but such as were still due for supplies, embargoes, and prizes made at sea, in which the appeal had been properly lodged within the time mentioned in the convention of September 30, 1800 (Article IV.).

4. That the benefits of the convention should be limited—

(1) To captures of which the Council of Prizes had ordered restitution and in respect of which the claimant might, in case the captors were insufficient, have recourse to the French Government (Article V.).

(2) To the debts mentioned in Article V. of the convention of September 30, 1800, the payment of which had been claimed of the government and in respect of which the creditors had a right to the protection of the United States (Article V.).

5. From the benefits of the convention there were expressly excluded—

(1) Prizes whose condemnation had been or should be confirmed (Article V.).

(2) Reclamations of American citizens "who shall have established houses of commerce in France, England, or other countries than the United States, in partnership with foreigners, and who by that reason and the

<sup>1</sup> Am. State Papers, For. Rel. II. 538.

<sup>2</sup> Am. State Papers, For. Rel. II. 475.

<sup>3</sup> Adams's History of the United States, II. Chap. 1.

nature of their commerce ought to be regarded as domiciliated in the places where such houses exist" (Article V.).

(3) "All agreements and bargains concerning merchandise, which shall not be the property of American citizens, \* \* \* saving, however, to such persons their claims in like manner as if this treaty had not been made" (Article V.).

6. For the ascertainment of the debts due under the convention, it was provided that the minister of the United States should name three persons, who should act "from the present and provisionally," and who should have power—

(1) To examine, without removing the documents, the claims "already liquidated" by the French bureaus, and, if they should find such claims to be within the convention and not within any of its exceptions, to certify that the debt was due to an American citizen, and that it existed before September 30, 1800, on which certificate the creditor should be entitled to an order on the Treasury of the United States (Article VI.).

(2) To examine, without removing the documents, claims "prepared for verification," and to certify those that ought to be admitted (Article VII.).

(3) Likewise to examine claims "not prepared for liquidation," and to certify in writing those that ought to be admitted to liquidation (Article VIII.).

But, in order that no improper demands might be admitted, it was provided—

(4) That the commercial agent of the United States at Paris, or such other agent as the American minister should nominate, should assist at the operations of the bureaus; that if he should be of opinion that any debt was not completely proved or was inadmissible, but the bureaus "should think that it ought to be liquidated," he should report thereon to the board established by the United States, who, without removing the documents, should examine the debt and vouchers and report the result to the American minister; and that the latter should "transmit his observations, in all such cases, to the minister of the treasury of the French republic, on whose report the French Government shall decide definitively in every case" (Article X.).

It was further provided that the rejection of any claim should have no other effect than to exempt the United States from the payment of it, the French Government reserving to itself the right to decide definitively on such claim so far as concerned itself (Article X.).

7. It was provided that every necessary decision should be made within a year from the exchange of the ratifications of the convention, and that no claim should be admitted afterward (Article XI.).

8. It was provided that the principal and interest of the debts allowed should be discharged by the United States, by orders drawn by their minister plenipotentiary on their Treasury, which orders should be payable sixty days after the exchange of the ratifications of the treaty and conventions, and after possession of Louisiana should be given to the United States (Article III.): and finally,

9. That debts contracted by the Government of France with citizens of the United States since September 30, 1800, might be pursued in the same manner as if the present convention had not been made (Article XII.).

The ratifications of the treaty and conventions were exchanged at Washington on the 21st of October 1803.

On May 18, 1803, Livingston and Monroe signed a commission appointing James Mercer, of Virginia; Isaac Cox Barnet, of New Jersey, commercial agent of the United States at Antwerp; and William McClure, of Richmond, Virginia, as a board for the purpose of examining claims. On the 29th of June this commission was delivered to Mercer and Barnet, McClure being temporarily in England. Fulwar Skipwith, commercial agent of the United States at Paris, was appointed as agent under Article X. of the convention to assist in the examination of claims.

**Difficulties of Commissioners.**

Messrs. Mercer and Barnet held their first meeting on July 5, 1803, and recognized Nathaniel Cutting, of Massachusetts, as secretary of the board. Mr. McClure, whose stay in England was unexpectedly prolonged, took his seat at the board on the 1st of September 1803. His colleagues had already fallen into difficulties. On consideration of the convention they were of opinion that no final act could be performed by them in relation to the objects embraced by it until its ratification by the competent authorities of the United States; but, while this opinion precluded all definitive decisions on claims, they deemed themselves competent to adopt certain preparatory measures which would hasten the conclusion of their labors in the event of the convention being ratified. In attempting to do so, however, they encountered serious obstacles.

**The "Conjectural Note."**

The second article of the convention declared, as we have seen, that the debts intended to be provided for were those whose result was comprised in the conjectural note annexed to it. To the copy of the convention which the commissioners received no such note was annexed. A paper purporting to be a copy of the conjectural note was presented to them by the agent of the United States, with the statement that he had received it from one of the American ministers. In order, however, to obtain for the document an official sanction it was sent to Messrs. Livingston and Monroe. It was subsequently returned by the former as a true copy of the note intended by the convention.

**Examination of Documents.**

The next question that arose related to the examination of documents. The convention provided that the documents should not be removed from the bureaus of the French Government, in which they were deposited. The commissioners were therefore required to perform their labors in the French offices, where other documents were deposited and where other business of the French Government was daily transacted, or else to obtain authentic copies of the various papers which it is necessary to examine. Deeming it impossible properly to conduct their business in the public offices, they consulted the French authorities, who readily undertook to aid them in obtaining copies of such documents as were required. The performance of this work was, however, necessarily attended with delay.

The next question which the commissioners were required to consider was the order in which the claims should be examined and decided. By the convention three classes of claims were designated, those that were "liquidated,"



those that were "prepared for verification," and those that were "prepared for liquidation." Claims of the first class were the only ones in which the creditors were expressly entitled to an immediate order on the Treasury of the United States on the simple certificate of the commissioners that their claims came within the convention. The commissioners, therefore, directed the agent of the United States first to attend to that class of claims.

In accordance with this view, the commissioners on  
*Rules of Procedure.* the 1st of August 1803 adopted the following rules:

"BOARD OF COMMISSIONERS OF THE UNITED STATES,  
*"Paris, Monday, August 1st, 1803.*

"Present: John Mercer. Isaac Cox Barnet.

"Ordered, That the following Rules and Regulations relative to the proceedings of this Board, be inserted in the Register of its transactions, viz:

"1. The Claims which were at the French Bureaux for liquidation or Settlement on the 30th of April 1803, shall be the first to be examined and decided upon by this Board.

"2. The decisions to be made upon the above-mentioned Claims shall be in point of priority according to their respective places on the conjunctural note annexed to the Convention—unless circumstances, should occur in particular Cases, which, in the opinion of the Board may justify their delaying to give an immediate decision; in which case they will proceed to consider some other Case next upon the said Conjunctural Note.

"3. In every case to be determined, a summary statement of it drawn from all the material evidence in the possession of this Board, shall immediately precede their final decision and make a part of the Record in the Register.

"4. No determination shall be finally made against any claim without giving a reasonable notice to the Claimant, his Attorney, Agent or Representative, if he is known to be in Paris.

"5. In every case where the claim shall be rejected by the Board, a copy of their opinion as stated upon this Register, shall be furnished to the Claimant, his Attorney, Agent or Representative, if he is in Paris, and his original papers, if any, in the possession of the Board, remitted to him, his Receipt for the same being first given to the Secretary to be by him filed among the Papers of this office.

"6. In every case of rejection, a similar copy may be sent to the proper Department of the French Government if required by them.

"7. When any claim shall be admitted, the following shall be the form of the Certificate to be signed by the Commissioners concurring in opinion, countersigned by the Secretary and by him delivered to the Minister of the United States; each Certificate to be numbered. This form may be so varied as to suit the character of the Person in whose name it shall issue, as Principal or Representative:

"The Undersigned Commissioners do certify to the Minister Plenipotentiary of the United States at Paris, that the claim of an American Citizen and Creditor of the French Republic, having been fully examined by them, is found to belong to the Classes of claims designated in the Convention above referred to, and embraced by the principles and qualifications established in it; and that the said \_\_\_\_\_ (or \_\_\_\_\_ who appears to have been regularly constituted his agent, attorney, representative or assignee, as the case may be)—is entitled to receive from the United States, under the said Convention, the sum of \_\_\_\_\_ as principal, and the sum of \_\_\_\_\_ as interest now due upon, and in full of, the said claim.

"Given under their hands, and the seal of this Commission, at Paris, this \_\_\_\_\_ day of \_\_\_\_\_."

"8. It shall be the duty of the Secretary to keep a list of all the certificates by him delivered to the Minister of the United States, designating in the said list the number of each Certificate, its date, the party's name, as

principal, agent, attorney, representative, or assignee, as expressed in the certificate, in whose name it has issued, the principal sum and interest for which it is granted, and the day of the month when by him delivered to the Minister of the United States.

"9. When either of the Commissioners shall dissent from the opinion of the other two, he shall have the right to state upon the register, his reasons, to be signed by him.

"10. Should it so happen that either Commissioner should feel himself interested in any claim that may come before the Board, he shall be at liberty to decline giving an opinion upon it; and in such case his absence from the Board may be stated in the Register, nor shall such Commissioner be required to sign the Certificate to be sent to the Minister when the Debt is admitted; or the copy of the opinion to be delivered to the claimant, when the claim shall be rejected.

"11. The Secretary will keep a list of all the claims arranged according to the respective dates at which the papers relating to them were presented to this Board by the French Department.

"He will also keep a regular account of the Expenses of the Board, taking and filing receipts for all sums paid for that purpose.

"12. The Board will meet every day, Saturdays and Sundays excepted, from the hours of eleven in the morning till four in the afternoon whenever there shall be any case undecided before them.

"JOHN MERCER.

"I. COX BARNET.

"N. B.—The documents being made a part of the Record in each case, has superseded the necessity of the Rule No. 3."<sup>1</sup>

**Erroneous Classifications.**

The investigations of Mr. Skipwith disclosed the fact that the terms of the convention, and especially the phrases "liquidated," "prepared for liquidation," and "prepared for verification," bore no relation to the actual state of the claims in the French offices, and furnished no guide to the order in which they should be examined. Under these circumstances the commissioners deemed it their duty to establish some principle for the investigation of claims, whose operation would be uniform and just; and with that view they determined that the claims on the conjectural note ought first to be examined and decided upon, according to the dates at which they respectively originated. This opinion was concurred in by Mr. McClure, when he took his seat at the board; and on the 17th of August the commissioners made the following order:

"17TH AUGUST 1803.

"The Board having reconsidered the 2nd Article of the Rules and Regulations for its proceedings adopted under date the 1st Current as recorded Page 33, and finding by the Report of the Agent of the United States (above recorded) that the Council of Liquidation of the French Government do not consider any of the outstanding American claims as definitively liquidated, although a certain number of them have been thus denominated heretofore, as appears by the 'Conjectural note' alluded to in the 2nd article of the Convention under which this Board was formed; therefore

"*Ordered*, That the 2nd article of the Rules and Regulations above mentioned be repealed so far as it relates to the order in which it was proposed to decide on the claims; and that the said claims shall in future be examined and determined upon according to the respective years in which they originated against the French Government."<sup>1</sup>

<sup>1</sup>MSS. Dept. of State.

**Difficulties in Exam-  
ing Claims.**

The difficulties of the board in respect of the examination of claims did not end with the promulgation of this new rule. No dates were entered in the conjectural note, and in order to carry the rule into effect the agent of the United States was requested to obtain from the French office a statement of the dates at which the claims respectively arose. While this statement was being prepared authenticated vouchers in certain claims belonging to the first, second, third, fourth, and fifth years of the republic were presented to the board, with information that they were arranged in conformity with the principle which had been established, and that they contained the whole number of claims (independently of the embargo claims) in the first four years. These claims embraced one in the first year, four in the second, twelve in the third, and seven in the fourth. Having no reason to doubt the correctness of this information, the two commissioners, on the 26th of August, directed the liquidation of one in the second year, four in the third, and three in the fourth, intending to suspend any further proceedings on them, and to withhold their final certificate, until the ratification of the convention by the United States was known. But, by the next communication of documents from the French department, it appeared that the first information was entirely incorrect; that there were various other claims belonging to the same years as those that had been presented; and that the true number could not be ascertained until the general statement had been received. A majority of the board, therefore, the third commissioner having taken his seat, determined to confine its attention to the examination of documents, without directing the liquidation of any other claims until, by the receipt of the general statement of dates, the board should be enabled to arrange the conjectural note, and to examine and decide upon the claims according to the principle which had been established. When the statement of dates was received the claims on the conjectural note were arranged under the several years in which they originated. This arrangement, however, did not enable the board to proceed with its examination, since the documents requisite for that purpose had not been fully received. Moreover, many claims were reported upon by the agent of the United States, which were not embraced in the conjectural note. No prize cases were found upon it. Whether the claims included in it would, with interest, consume the whole fund it was impossible to say; but the commissioners declared that they would not consider it their duty to direct any liquidations to be made beyond that sum.<sup>1</sup>

While the commissioners were thus struggling on they became engaged in an acrimonious correspondence with Chancellor Livingston. Livingston had set his heart on the early liquidation of the claims, and this desire was greatly intensified by the importunities of the claimants.<sup>2</sup> By the convention, the commissioners were to act "from the present and provisionally." The exchange of the ratifications of the convention took place at Washington

<sup>1</sup> Messrs. Barnet and McClure to Mr. Madison, Sec. of State, December 26, 1803, MSS. Dept. of State.

<sup>2</sup> Am. State Papers, For. Rel. VI. 178-180.

on the 21st of October 1803, and the President's approval of the persons appointed as commissioners was made known in a letter from Madison to Livingston on the 9th of the following month. Meanwhile Livingston had been complaining of the delays of the board, and urging it finally to decide the claims as from time to time they came before it. He had informed the French Government that he would probably begin to draw in September, and he expressed to the commissioners his surprise that, if they doubted their power to act until the ratification of the treaty, they should have accepted the places which they held.<sup>1</sup> The commissioners replied that since their appointment they had been constantly occupied in collecting papers to aid them in the examination of the claims; and they declared that they would execute the convention finally so soon as it became the supreme law of the United States, with the sanction of the competent authorities of that government, to whom alone they were responsible.<sup>2</sup> This declaration disclosed a radical difference of opinion between the commissioners and the American minister as to the former's powers, not only before, but after the ratification of the convention. While the commissioners maintained that they were to be guided in their action solely by their own views of the meaning of the convention, Livingston thought that they should act in cooperation with him, and defer to his construction, at any rate where it coincided with that of the French Government. When Livingston demanded of them whether they would, "in every case, adhere to the sense" which they had "put upon the convention, whatever may be the decisions of the French Government in concurrence with the wish expressed by the President," they replied: "Our answer is that we will adhere, in every instance, to the sense which we have put upon the convention, except where the changes produced by the French Government, as explained above, shall alter its character in conjunction with the wishes of the American Administration, conveyed to us according to the principles of the Federal Constitution." On receiving this declaration, Livingston declared that the commissioners "must be removed."<sup>3</sup> The commissioners, however, were not removed, nor would it be just to say that in all their positions they were wrong. Their differences with Livingston were sometimes due to the fact that the latter, for the purpose of accomplishing the end for which the convention was designed, was willing to go further than the commissioners in what might be called the creative interpretation of it.

**Defectiveness of the Convention.**

Though Livingston took to himself some credit for the framing of the convention, saying that he had drawn it "with particular attention," it was in reality hastily, loosely, and inaccurately constructed. The convention, as he drew it, did not, says Livingston, "exactly meet with Mr. Monroe's ideas, to whom the subject was new. He produced some modifications, and these

<sup>1</sup> Mr. Livingston to Messrs. Mercer, Barnet, and McClure, October 25, 1803. (MSS. Dept. of State.) An extract from this letter is printed in American State Papers, For. Rel. VI. 177.

<sup>2</sup> Commissioners to Livingston, October 29, 1803. (MSS. Dept. of State.)

<sup>3</sup> Livingston to Madison, May 4, 1804, Am. State Papers, For. Rel. VI. 198, 195, 194.

again, which have fully answered our purposes, were struck out by Mr. Marbois's wish to give a preference to debts that had a certain degree of priority in the French bureaux. The moment was critical; the question of peace or war was in the balance, and it was important to come to a conclusion before either scale preponderated. I considered the convention a trifle compared with the other great object."<sup>1</sup> Livingston was justified in taking this view of the matter, but his statement shows the manner in which the convention was pieced together. By the preamble the object of the convention was declared to be to secure the payment of the sums due by France to citizens of the United States, in compliance "with the second and fifth articles" of the convention of September 30, 1800. This declaration was on its face misleading, since the claims mentioned in the second article of the convention of 1800 were first postponed and then abandoned. The real object of the convention was correctly expressed by Livingston and Monroe, when, in first transmitting it to their government, they stated that they had obtained not exceeding 20,000,000 francs for the citizens of the United States "in discharge of the debts due to them by France, under the convention of 1800."<sup>2</sup> This fact was repeatedly stated by Livingston.<sup>3</sup> There was, however, some ground for the assertion of Skipwith, that it was "a convention of exceptions to the one of 1800."<sup>4</sup>

The particulars in which the convention of 1803 failed

Omitted Claims. to include claims embraced in that of 1800 were:

1. The convention of 1800 provided for the restitution of vessels and property taken and condemned between the date of its signature and the date of its ratification. The convention of 1803 restricted claims for captures to cases in which the Council of Prizes had ordered restitution.

2. Among the cases that came within the convention of 1800 were claims for freight. By the convention of 1803 the claims were confined to debts "for supplies, for embargoes, and prizes made at sea;" and, as has been seen, the claims for captures were limited to those in which restitution had been decreed. In the French text the equivalent of the word "supplies" was "*fournitures*." Livingston contended that under these terms claims for freight were admissible; the commissioners took the opposite view.<sup>5</sup>

3. By Article V. of the convention of 1800 provision was made for the payment of "debts contracted by one of the two nations with individuals of the other." By the convention of 1803 it was provided that this stipulation should not comprehend any claims of American citizens who had established houses of commerce abroad in partnership with foreigners. This provision seemed to exclude even the individual claims of citizens of the United States who had entered into such partnerships.

<sup>1</sup> Livingston to Madison, May 3, 1804, Am. State Papers, For. Rel. VI. 196.

<sup>2</sup> Am. State Papers, May 13, 1803, For. Rel. II. 559.

<sup>3</sup> Am. State Papers, For. Rel. VI. 186, 196.

<sup>4</sup> Am. State Papers, For. Rel. VI. 187.

<sup>5</sup> Id. 188, 190, 191.

Madison instructed Livingston to enter into an arrangement with France for the adjustment of claims embraced in the convention of 1800, but excluded by that of 1803; and, if this could not be done, to endeavor to concert with the French Government such a construction of the latter convention as would be most favorable to all just claims, and especially to those for "freights, indemnities, property put in requisition, and the separate property of individuals" who had established houses abroad in partnership with foreigners. The French Government declined to enter into any new arrangement. It concurred with Livingston, however, in his construction of the word "supplies" or "*fournitures*." "It can not be supposed," said Marbois, "that the negotiators wished to give a preference to one kind of claims, to the prejudice of money lent, or of debts due for freight; in fine, this meaning is grammatical; for money and all kinds of means of service are furnished, and this also embraces freight." This reasoning was not satisfactory to the commissioners, who maintained that the word "*fourniture*" could not supply the place of the word "*freight*," though they held that it might apply to money lent.<sup>1</sup> The principles on which the commissioners acted were stated by them as follows:<sup>2</sup>

"We consider the claims of American citizens upon the French Government under the convention of 1800, as directed to be settled according to the regulations and principles established in that under which we have been appointed: We have therefore considered it our duty to inquire:

"1st. Whether the Debt was due in its origin to an American citizen.

"2ndly. Whether it existed before the 30th of September 1800.

"3rdly. Has such American citizen established a House of Commerce in foreign countries in partnership with Foreigners?

"4thly. Can he by the nature of his Commerce be considered as domiciliated abroad?

"5thly. Has he under the circumstances of his case a right to the protection of the United States?

"6thly. Was the merchandize, or other property, American when it passed into the hands of the French Government?

"7thly. Does the claim arise from Supplies, Embargoes or Captures made at sea; excluding from the word Supplies,—Freight, Indemnity and Demurrage,—except when they were claimed as being incidental to Embargoes?

"8thly. In Prize Cases we shall examine whether order of restitution has been made by the Council of Prizes? Whether the insufficiency of the captors is shown?

"9thly. We consider it correct to examine the cases upon the 'Conjectural Note' before any other—to decide upon them according to their respective dates, when the state of the papers will allow us to preserve this order.

"10thly. We consider it a fair construction of the Convention that we have no authority to direct any Liquidation after the 20,000,000 of Livres shall be covered; and that our Duties here will terminate on the 21st of October next, that being the day, according to our information, which will complete the year from the time when the ratification was exchanged at Washington."

Having completed their examination of the claims  
**Forms of Certificates.** on the conjectural note, the commissioners, on the 15th of May 1804, no returns having been made by the French offices of any final liquidations in the cases already certified, pro-

<sup>1</sup> Am. State Papers, For. Rel. VI. 190.

<sup>2</sup> Commissioners to Livingston, April 30, 1804, MSS. Dept. of State; Am. State Papers, For. Rel. VI. 193.

ceeded to examine claims not on the note, and to grant conditional certificates in cases found to be within the convention, the condition being that "the amount of principal and interest found due on those claims heretofore certified for liquidation shall not exceed the sum of 20 millions of livres." Of the usual forms of the certificates (1) in cases on the conjectural note, and (2) in cases not on that note, the following examples may be given:

"The case of Messieurs Dunlap & Irwin—Supplies, &c.—originating in the 6th year of the French Republic, and marked No. 121, on the Conjectural Note; The Board having fully examined the Documents & Papers regularly certified to them in this Case, and which are to be considered as a Part of this Record, & considered all the proofs produced in relation to it, and having ascertained that the said John Dunlap and Thomas Irwin were citizens of the United States when this claim originated against the French Republic, and that in every respect it has the necessary qualifications to bring it within the description of claims intended to be provided for by the convention of the 30th of April 1803, between France and the United States, are of opinion that the said claims ought to be admitted to liquidation by the proper Department of the French Government with Interest from the period when the accounts and vouchers belonging to it were presented to the said Government:—Therefore

*Ordered*, that this Board do certify to the French Bureau established for the Liquidation of American claims, that the above mentioned claim of John Dunlap & Thomas Irwin, so far as the same is made for supplies, ought to be admitted to liquidation, for that amount only, with interest as above stated, and returned to this Board without delay."

"The Case of John Townsend. (Colonial Bill.) (Year 2, of the F. R. Supple'y List No. 51.)

"In pursuance of the Rule of Proceeding adopted on the 15th of the present month (vid: page 164 of this Register) the Board having fully examined the documents and vouchers regularly certified to them in this case, (not found on the "Conjectural Note," and which are to be considered as a part of this Record,—and having duly attended to all the proofs produced in relation to it, are of opinion, that the said claim has the qualifications necessary to bring it within the description of claims intended to be provided for by the Convention of the 30th of April, 1803, between the United States and France, provided the amount of principal and interest found due on those already certified for Liquidation shall not exceed 20 millions of livres;—therefore

*Ordered*, That this Board do certify to the French Bureau established for the Liquidation of American claims, that the above-mentioned claim of John Townsend ought to be admitted to Liquidation with interest, as stipulated in the Convention aforesaid,—*provided* that the amount of principal and interest found due on those claims heretofore certified for liquidation shall not exceed the sum of 20 millions of livres: this liquidation to stand according to the date of the claims, and in reference to the respective periods at which other claims, not found on the Conjectural Note, originated."

The form of a certificate of disallowance was as follows:

"The Elie Cabot—claiming for Cargo and Indemnity, etc. (Originating in the 4th year of the French Republic, and marked No. 88 on the "Conjectural Note"):

"The Board having fully examined the documents and vouchers regularly certified to them in this Case and which are to be considered as a part of this Record, and having duly attended to all the proofs produced in relation to it, are of opinion that the said claim is excluded from the

Benefit of the Convention of the 30th of April 1803 between the United States and France, and ought not to be certified for liquidation to the French Bureau."

On the 5th of October 1804 the commissioners in-  
Right of Final Decision. formed Livingston that they had directed 324 claims to be liquidated and had rejected 142, and that only 5 yet remained to be decided.<sup>1</sup> Few prize cases had been brought before them; the greater part of such cases were either still pending before the Council of Prizes, or else were in the course of judicial pursuit by the claimants for the purpose of ascertaining the situation of the captors.<sup>2</sup> But, although the business of the board was thus practically completed, the French offices continued to withhold returns of final liquidation; and early in October the commissioners learned that the Council of Liquidation asserted the right to liquidate claims which they had rejected, and to reject claims which they had certified for liquidation.<sup>3</sup> This position was assumed in accordance with the view, in which Livingston and Marbois concurred, that under Article X. of the convention the final decision of claims rested with the French Government.<sup>4</sup> The commissioners took the ground that under Article VI. of the convention their certificate was necessary to enable the minister of the United States to draw on its Treasury. In 23 cases in which the Council of Liquidation assumed to liquidate claims which they had rejected, the commissioners submitted to the minister of the United States a detailed report, showing that their action in each case was based on the fact that the claim was excluded by one or more of the principles adopted by the board for the government of its decisions.<sup>5</sup> Moreover, the commissioners were informed by Skipwith that the Council of Liquidation, besides liquidating rejected claims, refused to liquidate 45 claims certified by the board for that purpose.<sup>3</sup>

Commissioners' Ad-  
jourment.

It has been seen that by the eleventh article of the convention it was provided that "every necessary decision" should be made within a year from the exchange of the ratifications, and that "no reclamation" should be admitted afterward. The ratifications were exchanged on the 21st of October 1803. On October 21, 1804, the board being then in session, Mercer entered on the record a protest "against keeping the register open after the present date and against all and every act hereafter performed by this commission under authority of the aforesaid convention."<sup>1</sup> The board, however, continued in session from day to day, in order to be "in readiness to make any further official reports which the proceedings of the French Council of Liquidation might render necessary," till the 24th of November. On that day they received from General Armstrong, who had just succeeded Chancellor Livingston as minister of the United States, a letter stating that Livingston and Marbois had settled the construction of the convention as to the character of the voucher required to enable the minister of

<sup>1</sup> MSS. Dept. of State.

<sup>2</sup> Commissioners to Livingston, August 13, 1804, MSS. Dept. of State.

<sup>3</sup> Commissioners to Livingston, October 12, 1804, MSS. Dept. of State.

<sup>4</sup> Am. State Papers, Fr. Rel. VI. 187, 188, 189, 202, 203.

<sup>5</sup> MSS. Register of the Commissioners, 376, et seq.



the United States to draw in favor of claimants, and had agreed that the *mandat* of the French Government formed such a voucher, thus carrying out the principle that the final decision rested with that government.<sup>1</sup> The commissioners thereupon adopted an order in which, after stating that they had learned from the minister of the United States that their further services either as to the final rejection or the liquidation of claims were "rendered unnecessary," they declared that they would continue their services only so long as might be necessary for making up their accounts and closing their office. This order was signed by all the commissioners. On Sunday, November 25, Maclure entered on the register of the board a declaration, signed by himself alone, in which he said that, considering the statement made by Armstrong that the *mandat* of the French Government formed a sufficient voucher for drawing bills "to be the opinion and wish of the American Executive," he was of opinion that the functions and duties of the board were at an end, and "that at no period were their operations either useful or necessary for the accomplishment of such a settlement, no mention being made of such a voucher or *mandat* in the convention under the authority of which this board was constituted." Barnett signed a separate declaration, merely expressing "the opinion that the utility of this board is now at an end." The board then adjourned to Monday, November 26. The last entry in the register was made on Saturday, December 1, 1804. It states that the board had been in session, agreeably to successive adjournments, every day during the week, for the purpose of closing its business, and had rendered to the American minister an account of expenses; that it had ordered a list of the claims decided by it to be deposited with the agent of the United States for the information of any whom it might concern, the time not permitting the execution of the fifth article of the rules,<sup>2</sup> and that it had also ordered that its papers be sealed up and placed in the office of the commercial agent of the United States at Paris, subject only to the order of the Government of the United States.

The board then adjourned *sine die*.<sup>3</sup>

The claims allowed by the board were chiefly for embargoes and supplies. Only eight claims were allowed in prize cases. The rejections included claims whose owners had established houses of commerce in connection with foreigners, claims for captures made after September 30, 1800, and claims of citizens of France, or of persons who failed to establish their citizenship of the United States. Many claims on account of captures

<sup>1</sup> Armstrong to the commissioners, October 23, 1804, MSS. Dept. of State.

<sup>2</sup> This rule provided: "In every case where the claim shall be rejected by the board, a copy of their opinion as stated upon this register shall be furnished to the claimant, his attorney, agent, or representative, if he is in Paris, and his original papers, if any, in the possession of the board remitted to him, his receipt for the same being first given to the secretary to be by him filed among the papers of this office."

<sup>3</sup> The formal record of the proceedings of the commission is contained in two manuscript volumes in the Department of State, one of which is entitled "American Commission, Paris, 1803: Register A;" and the other, "American Commission, Paris, 1803: Letter Book, No. 1."

and detentions were dismissed because they had not been brought before the Council of Prizes.<sup>1</sup> Though Livingston supposed when the convention was made that the sum of 20,000,000 francs, or \$3,750,000, would suffice to pay all admissible claims,<sup>2</sup> the fact proved to be otherwise. The final disposition of the claims having been undertaken by the French Government, their liquidation and payment became the subject of a violent controversy, in which charges of corruption were freely made.<sup>3</sup> In 1807 Maclure published the journal of the board in Philadelphia. It makes a pamphlet of 145 pages. On the cover it is addressed "To the people of the United States." Inside the cover there is the following inscription:

"To satisfy rational inquiry—prevent misrepresentation and shew how far the late American Commissioners at Paris endeavored to execute what they considered their duties under the convention of April 1803; the following statement of their transactions is respectfully submitted to an enlightened and discriminating Public without any observations or declarations by

A MEMBER OF THE LATE BOARD."<sup>4</sup>

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<sup>1</sup>S. Ex. Doc. 87, 34 Cong., 1 sess., contains a list of the claims allowed and rejected by the commissioners. Their register was exhibited to the Senate, or to a committee thereof, in the custody of a clerk of the Department of State, but was not printed.

<sup>2</sup>Am. State Papers, For. Rel. VI. 175, 179, 183, 187, 199.

<sup>3</sup>Adams's History of the United States, II. 48-50.

<sup>4</sup>In the Department of State there is a pamphlet entitled: "Two Letters from F. Skipwith, esq., to General Armstrong, with the General's Answers and Sundry documents, Printed 1806. Department of State of the United States." See Mr. Forsyth, Sec. of State, to Mr. Causten, November 10, 1834, MS. Dom. Let. XXVII. 106.

## CHAPTER B.

### FRENCH INDEMNITY: CONVENTION WITH FRANCE OF JULY 4, 1831.

The respite which commerce enjoyed from belligerent depredations after the Peace of Amiens was destined to be of brief duration, and the renewal of the struggle between France and Great Britain was, ere long, followed by measures which, though they hold in the history of belligerent pretensions an unhappy preeminence, are not even entitled to the merit of originality. Napoleon's continental system, which was based on the idea of subjugating England by destroying her commerce, was, as has been pointed out in the preceding chapter, prefigured by the decrees of the Directory in 1796; and the British orders in council were but the consummation of the claims previously made of a right to prevent neutral commerce from contributing to the support of the enemy.<sup>1</sup>

On April 8, 1806, the British Government, in retaliation for a decree of Prussia, issued on the occupation of Hanover, excluding British trade, declared the mouths of the Ems, Weser, Elbe, and Trave to be in a state of blockade.<sup>2</sup> On the

<sup>1</sup> In July 1805 was decided the famous case of the *Essex*. In the case of the *Polly*, February 5, 1800, (2 C. Rob. 361) it was held that the landing of cargo and payment of duty in the United States constituted a sufficient interruption of the continuity of a voyage to enable a neutral vessel, in spite of the rule of 1756, to carry a cargo from the colony of a belligerent to the ports of the parent country, and vice versa. Under this decision the American carrying trade greatly flourished. In 1805 the American vessel *Essex* went to Barcelona and took on board a cargo of Spanish produce for Havana, under instructions, however, to touch at Salem, in Massachusetts, before proceeding to her ultimate destination. Having been captured by a British cruiser, she was condemned, Sir William Scott, who had also delivered the judgment in the case of the *Polly*, holding that the "mere touching at any port without importing the cargo into the common stock of the country, will not alter the nature of the voyage;" that the existence of an "original intention" to send the vessel on was sufficient to make the voyage continuous; and that a "continued voyage from the colony of the enemy to the mother country, or to any other ports but those of the country to which the vessel belongs, will subject the cargo to confiscation." (5 C. Rob. 368. Criticised in Madison's Works, II. 336.)

<sup>2</sup> Translations and Reprints from the Original Sources of European History, Vol. II. No. 2, p. 17. On March 28, 1806, Count Schullenberg published a decree reciting that, in a treaty concluded between the King of Prussia

16th of May a similar declaration was made in respect of the whole coast of the continent, from the river Elbe to the port of Brest, inclusive. In the following September this blockade was declared to be discontinued as to the coast from the Elbe to the Ems.<sup>1</sup>

In the mean time Napoleon had been meditating the adoption of further measures for the enforcement of his continental system. On the 14th of October 1806 he dispersed the Prussian army at Jena, and on the 27th of the same month entered Berlin. On the 21st of November, four days before setting out from the Prussian capital on his journey to Poland and Russia, he signed at the imperial camp the famous Berlin Decree, which significantly declared that its provisions would "continue to be looked upon as embodying the fundamental principles of the Empire" until England should return to the observance of the law of nations on land and sea. In the preamble to the decree it was recited that England did not recognize the law of nations; that she made prisoners of war of noncombatants, and confiscated private property; that she declared places in a state of blockade before which she had not even a single ship of war, and assumed to extend the right of blockade to entire coasts and the whole of an empire; that the object of these measures was to raise the commerce and industry of England upon the ruins of that of the continent; and consequently that whoever dealt on the continent in English goods rendered himself an accomplice of her designs. To oppose an enemy with such arms as he made use of was a natural right, and it was therefore decreed:

1. That the British Isles were in a state of blockade.
2. That all commerce and all correspondence with them were prohibited.
3. That every English subject found in the countries occupied by French troops, or by those of her allies, should be made a prisoner of war.
4. That all property or merchandise belonging to British subjects should be regarded as lawful prize.
5. That all trade in English goods was forbidden, and that all merchandise belonging to England, or coming from her factories or her colonies, was lawful prize.
6. That half the product of confiscation under the preceding articles should go to indemnify merchants for losses suffered by the capture of their merchant vessels by English cruisers.
7. That no vessel coming directly from England or from the English colonies, or which should have been there since the publication of the decree, should be received in any port.
8. That any vessel contravening the preceding provision by a false declaration should be seized, and the vessel and cargo confiscated as if they were English property.

In all cases arising under the decree in the empire, or in the countries occupied by the French army, jurisdiction to pronounce final judgment

and the Emperor of the French, it had been stipulated "that the ports of the North Sea, as well as all rivers running into it, shall be shut against the British ships and trade, in the same manner as when the French troops occupied the State of Hanover." (Ann. Reg. 1806 (159).) On April 1 a proclamation was issued by the King of Prussia, taking definitive possession of Hanover. (Ann. Reg. 1806 (160).)

<sup>1</sup> Am. State Papers, For. Rel. III. 267.

was vested in the Council of Prizes at Paris. The Council of Prizes at Milan was authorized to pronounce final judgment in cases arising "within our Kingdom of Italy." It was also ordered that the decree should be "communicated by our minister of foreign affairs to the King of Spain, of Naples, of Holland, and of Etruria, and to our other allies whose subjects, like ours, are the victims of the unjust and barbarous maritime legislation of England." And, finally, it was declared that "our ministers of foreign affairs, of war, of marine, of finance, and of the police, and our directors-general of the ports are charged with the execution of the present decree so far as it affects them."

When Armstrong, then minister of the United States at Paris, read this decree, he sought from Decrès, the minister of marine, an explanation of it. Decrès answered that he considered it "as thus far conveying no modification of the regulations at present observed in France with regard to neutral navigators, nor consequently of the convention of September 30, 1800, with the United States of America;" but he cautiously added that it would be proper for Armstrong to communicate with the minister of foreign affairs, Talleyrand, who might have more positive information on the subject<sup>1</sup>. Talleyrand was then absent. Literally and indeed naturally construed, the decree directly violated the twelfth, thirteenth, and fourteenth articles of the convention of 1800, which respectively guaranteed freedom of trade with the enemy in goods not contraband, restricted contraband to certain enumerated articles, and provided that free ships should make free goods. For a period of nine months the Government of the United States, by being kept in a state of hopeful uncertainty as to the effect of the decree, was led to appear to acquiesce in it. On the assumption that only the seventh and eighth articles of the decree, respectively prohibiting the entrance of vessels coming directly from English ports, and denouncing confiscation in such case for the use of false papers, would be enforced against the United States, Armstrong as late as July 7, 1807, wrote to Monroe that it was admitted that the Berlin decree did not violate the convention of 1800. He also stated that of the rule respecting entrance into French ports, he had obtained modifications, so that (1) vessels leaving ports of the United States before the decree was known there were not subject to the rule; (2) vessels not coming directly from a British to a French port were not subject to it; (3) the cargoes of vessels coming directly from a British port to a French port were, on proof that the touching of the ship in England was involuntary, put in sequestration till His Majesty should have decided on the sufficiency of the proof of *force majeure*, the vessel meanwhile being free to go away. In the following September, however, the imperial purposes were partially disclosed, in such manner as to harmonize with what had actually been taking place. On the 18th of September 1807, Regnier, the minister of justice, writing to the imperial attorney-general for the Council of Prizes, communicated an imperial decision of the 4th of the month on certain questions touching the Berlin decree. Might vessels of war by virtue of the decree seize, on board of neutral vessels, either English property or merchandise proceeding from manufacturers in English territory? In answer,

<sup>1</sup>Adams's History of the United States, III. 390.

it was said that His Majesty had "intimated that, as he had not thought proper to express any exception in his decree, there is no ground for making any in its execution." In the second place it was stated that His Majesty had "postponed a decision on the question, whether French armed vessels might capture neutral vessels bound to or from England, even when they have no English merchandise on board."<sup>1</sup> The purport of this decision, which was also circulated by the director-general of the customs, was that every neutral vessel coming from an English port, with a cargo of English merchandise, or goods of English origin, might be lawfully seized by French armed vessels; and in this sense the Council of Prizes proceeded at once to apply it.<sup>2</sup>

The practical value of the "modifications" which  
**The Antwerp Cases.** Armstrong obtained of the Berlin decree is well illustrated in what were known as the Antwerp cases. After the imperial decision of the 4th of September, several American vessels bound to Antwerp were sent away. Prior to that time, however, seven American vessels which had been compelled to touch in England, were admitted; and in accordance with the modified rule their cargoes were sequestered, the vessels themselves being permitted to depart. On August 9, 1807, Armstrong, writing to Champagny, said: "I learn that the cargoes \* \* \* are yet under sequestration, and that considerable loss as well by diminution of price in the articles, as by accumulation of interests and charges, has been already incurred."<sup>3</sup> By an order of July 2, 1808, Bonaparte ordered that the cargoes should be sold and the proceeds placed in the *caisse d'amortissement*, which was the depository of trust funds and securities, and that inquiry should be made as to whether the vessels were not British. The inquiry having elicited the clearest proof that the vessels and cargoes were exclusively owned by American citizens, the execution of the order of sale was postponed. But in 1810 the last of the cargoes was sold, and by an imperial order of July 22, 1810,<sup>4</sup> the proceeds were taken from the *caisse d'amortissement* and turned into the public treasury. Thus the property was finally devoted to imperial uses without trial or condemnation.<sup>5</sup>

To the imperial measures the British Government  
**Orders in Council.** quickly responded. On January 7, 1807, Lord Howick, referring to the Berlin decree, issued an order in council by which neutral vessels were forbidden to trade from one port to another, both of which were in the possession or control of France or her allies.<sup>6</sup> On the 11th of November further orders were issued. These orders, which were issued on the advice of Spencer Perceval and George Canning, and against the remonstrance of Lord Bathurst, the president of the board of trade, prohibited neutral vessels from trading with the ports of France and her allies, and with all ports in Europe from which, though they were not at war with His Britannic Majesty, the British flag was

<sup>1</sup> Am. State Papers, For. Rel. III. 25, 244.

<sup>2</sup> Am. State Papers, For. Rel. III. 245.

<sup>3</sup> Am. State Papers, For. Rel. III. 243.

<sup>4</sup> Adams's Writings of Gallatin, II. 209.

<sup>5</sup> Am. State Papers, For. Rel. V. 284, *et seq.*

<sup>6</sup> Am. State Papers, For. Rel. III. 267.

excluded, unless such vessels should clear from a British port under regulations to be prescribed in the future.<sup>1</sup> By these orders the ships were required to import their cargoes into England, subject to the laws regulating the payment of customs, and thus to carry on their commerce by way of England.

**Milan Decree.** On the 17th of December 1807, Napoleon issued at Milan, in retaliation for the British orders in council of the 11th of the preceding November, a decree by which

he declared:

1. That every ship that had submitted to be searched by an English ship, or had consented to a voyage to England, or had paid any tax to the English Government, was *ipso facto* denationalized, and was to be deemed good prize.

2. That the British islands were in a state of blockade, and that every ship that should sail from or be destined to a port in Great Britain or the British possessions, or in any country occupied by the British troops, should be good prize.<sup>2</sup>

**Answer to American Remonstrance.** To the remonstrance of the United States the French Government replied that, as the result of the orders in council of November 11, 1807, war existed in fact between England and the United States, and that the Emperor had ordered that the American vessels which might have been brought into the ports of France "should remain sequestered until a decision may be had thereon, according to the disposition which shall have been expressed by the Government of the United States."<sup>3</sup> On February 17, 1808, Armstrong said it would appear, from a communication from the minister of marine, that the promise of forbearance would apply only to vessels sequestered in French ports, and not to such as had been captured at sea; and on the 22d of February he reported that two of the sequestered ships and their cargoes had been confiscated by a special decision of the Emperor.<sup>4</sup> On the 18th of July he reported a demand which he had made for an avowal or disavowal of the destruction of four American ships and their cargoes on the high seas by Admiral Baudin.<sup>5</sup>

**Embargo of 1807.** On the 17th of March 1808 President Jefferson communicated to Congress an unofficial copy of the Milan decree, with the comment that the various decrees and orders in council wanted "little of amounting to a declaration that every neutral vessel found on the high seas, whatsoever be her cargo, and whatsoever foreign port be that of her departure or destination, shall be deemed lawful prize;" and that they proved "more and more the expediency of retaining our vessels, our seamen, and property within our own harbors, until the dangers to which they are exposed can be removed or lessened."<sup>6</sup> This passage referred to the act of Congress of December 22,

<sup>1</sup> Am. State Papers, For. Rel. III. 269-270; Walpole's Life of Spencer Perceval, II. 227.

<sup>2</sup> Am. State Papers, For. Rel. III. 290.

<sup>3</sup> Id. 249.

<sup>4</sup> Id. 250.

<sup>5</sup> Id. 253.

<sup>6</sup> Id. 80.

1807, by which an embargo was laid on vessels in the ports of the United States. To the immediate operation of this measure an exception was made in favor of foreign vessels, which were allowed to depart either loaded or in ballast, on receiving notice of the act.<sup>1</sup>

When this act took effect many American vessels were in foreign seas, and it was notorious that they subsequently remained abroad in order to escape the operation of the embargo. Nevertheless, Napoleon, exhaustless in resource, saw in the act a new opportunity. Up to this time the measures of the belligerents had applied equally to all neutral vessels. Napoleon now struck a blow at American commerce alone. By an edict of April 17, 1808, commonly known as the Bayonne Decree, he ordered the seizure of all American vessels which should enter the ports of France, Italy, or the Hanse Towns.<sup>2</sup> This measure he justified on the ingenious pretense that, since the laying of the embargo in the United States, no American vessel could navigate the seas without violating the laws of its own country, and thus furnishing a presumption that it was doing so on British account or in British connection.<sup>3</sup>

By an act of Congress of March 1, 1809,<sup>4</sup> the embargo was repealed, and a policy of nonintercourse as to Great Britain and France was substituted for it. By this act public ships of those countries were forbidden to enter the ports of the United States; and their merchant vessels were forbidden to enter, on penalty of forfeiture, after the 20th of the following May. From and after the same date the importation of merchandise from British and French ports was forbidden. The President was authorized by proclamation to suspend these prohibitions in respect of either nation in case it should revoke or modify its orders or decrees so that they should cease to violate the neutral commerce of the United States. This act was to remain in force only to the end of the next session of Congress. It was continued in force by the act of June 28, 1809.<sup>5</sup>

The act of March 1, 1809, was communicated by Arm-  
strong to the French Government on the 29th of the  
next April.<sup>6</sup> It provoked no remonstrance. On the  
contrary, moved partly by the fact that the imperial decrees were not operating to the advantage of France, partly by Erskine's arrangement for the suspension of the orders in council, and partly by the new British orders of April 26, 1809, by which a blockade of ports and places under the Government of France was substituted for the orders of November 11, 1807, Napoleon at one time contemplated an arrangement with the United

<sup>1</sup> 2 Stats. at L. 451, 452. This act was supplemented by acts of January 9, 1808, 2 Stats. at L. 453; March 12, 1808, 2 Stats. at L. 473; April 25, 1808, 2 Stats. at L. 499; January 9, 1809, 2 Stats. at L. 506.

<sup>2</sup> Adams's History of the United States, IV. 303.

<sup>3</sup> Am. State Papers, For. Rel. III. 291.

<sup>4</sup> 2 Stats. at L. 528.

<sup>5</sup> 2 Stats. at L. 550.

<sup>6</sup> Am. State Papers, For. Rel. III. 324.



States under which the Milan decree should be repealed.<sup>1</sup> The refusal of the British Government to carry out Erskine's arrangement, and the victory over the Austrians at Wagram in July 1809, led Napoleon to recur to his previous policy with increased determination.<sup>2</sup> The repeal by Great Britain of her orders in council, or else forcible resistance to them by the United States, was adhered to as the price of relief from the French decrees.<sup>3</sup> Nor did the Emperor stop here. Orders were secretly given toward the close of 1809 for the seizure of American vessels, and many vessels and their cargoes were seized and sequestered. On February 14, 1810, the Duke of Cadore wrote to Armstrong that, as France was joined with England in the exclusion from the ports of the United States since May 1809, His Majesty had ordered reprisals on American vessels in France and in the countries under his influence. "In the ports of Holland, of Spain, of Italy, and of Naples," said the Duke, "American vessels have been seized, because the Americans have seized French vessels."<sup>4</sup> On March 10 he informed Armstrong that the Emperor had decided to sell the American property seized in Spain, the proceeds to remain in deposit.<sup>5</sup>

Not only the American property seized in Spain, but *Rambouillet Decree.* also that seized in other places, was soon disposed of by a comprehensive edict. On March 23, 1810, Napoleon issued at Rambouillet a new decree, ostensibly in retaliation for the non-intercourse act of March 1, 1809, by which he ordered that all American vessels which, counting from May 20, 1809, the day when the act took effect as to British and French merchant vessels, had entered or should enter any port in France or her colonies, or in any country occupied by the French arms, should be seized, and the proceeds of the sales paid into the *caisse d'amortissement*.<sup>6</sup>

This decree, which was not published till May 1810, operated retroactively both for the purpose of authorizing seizures and of confirming those that had already been made.

On March 16, 1810, Louis Napoleon, as King of Holland, was forced to sign a convention to hold at the disposal of the Emperor the American vessels and cargoes seized in that kingdom. The business went through the usual course. By a secret decree of July 22, 1810, the proceeds of the American property seized in Spain and Holland, as well as that previously seized at Antwerp, were directed to be turned into the public treasury.<sup>7</sup>

The loss to Americans in consequence of the Rambouillet decree has been estimated to have been not less than \$10,000,000.<sup>8</sup>

<sup>1</sup> Adams's History of the United States, V. 63, 138.

<sup>2</sup> Adams's History of the United States, V. 143.

<sup>3</sup> Am. State Papers, For. Rel. III. 325-326.

<sup>4</sup> Am. State Papers, For. Rel. III. 380.

<sup>5</sup> Am. State Papers, For. Rel. III. 381. In Am. State Papers, For. Rel. III. 334, there is a list of 48 American vessels condemned by the Council of Prizes from December 18, 1806, to May 26, 1809.

<sup>6</sup> Am. State Papers, For. Rel. III. 384. See, generally, Adams's History of the United States, V. chs. XI. XII.

<sup>7</sup> Adams's Writings of Gallatin, II. 209. See as to an imperial order of April 11, 1810, Am. State Papers, For. Rel. III. 383.

<sup>8</sup> Adams's History of the United States, V. 242, 243.

**Repeal of Noninter-  
course Act.**

On May 1, 1810, the nonintercourse act of March 1, 1809, being about to expire, Congress replaced it with a new act by which it was provided that in case either Great Britain or France should, before the 3d of the ensuing March, so revoke or modify her edicts that they should cease to violate the neutral commerce of the United States, the provisions of the nonintercourse act should, three months after such revocation or modification, be revived as to the nation refusing to revoke or modify its decrees. It was left to the President to determine by proclamation whether the revocation or modification required by the act had been made.<sup>1</sup>

**Cadore's Letter of Au-  
gust 5, 1810.**

On August 5, 1810, the Duke of Cadore, writing to Armstrong and referring to the act of Congress of May 1, 1810, declared that after the 1st of November the Berlin and Milan decrees would cease to have effect, it being understood that the English should revoke their orders in council, or that the United States should, conformably to the act in question, cause their rights to be respected by the English.<sup>2</sup>

**Fancied Revocation of  
French Decrees.**

This communication was construed by Armstrong to mean that the Berlin and Milan decrees would cease to operate on the 1st of November on one of two conditions, namely, either that Great Britain should repeal her orders in council so far as they affected the commerce of the United States, or that the United States should revive toward her certain sections of the nonintercourse act conformably to the act of May 1. Such was Armstrong's statement to Pinkney on September 29, 1810. On the 12th of that month, however, the Duc de Cadore, in answer to certain inquiries, had told Armstrong that the Rambouillet decree was repealed as soon as they heard of the repeal of the act of nonintercourse against France, and that American vessels laden with American produce would be received in the ports of France, "provided they had not suffered their flag to lose its national character by submitting to the acts of the British council." He further said that the Emperor had "given licenses to American vessels."<sup>3</sup>

**Nonintercourse with  
Great Britain.**

On November 2, 1810, President Madison, on the strength of the Duke of Cadore's note of August 5, issued a proclamation relieving French commerce from the restrictions of the nonintercourse act, and on the same day a circular was sent to the collectors of customs informing them of the fact and instructing them from and after the 2d of February 1811 to carry into effect the provisions of the nonintercourse act by prohibiting the entrance of British vessels and produce into the United States, unless they should by that day be informed of the revocation of the orders in council so far as they violated the rights of the United States.<sup>4</sup> The Duke of Massa, minister of justice, on December 25, 1810, addressed to the president of the Council of Prizes a letter to the effect that, in view of this action on the part of the United States, the Emperor had directed that captures of American vessels since November 1 should not be judged by the Berlin

<sup>1</sup> 2 Stats. at L. 605.

<sup>2</sup> Am. State Papers, For. Rel. III. 387.

<sup>3</sup> Id. 388-389.

<sup>4</sup> Id. 392.

and Milan decrees, but should "remain suspended," and that the vessels and cargoes should remain "in a state of sequestration" till the 2d of February, when, the United States "having fulfilled the engagement to cancel their rights to be respected," they should be restored. A similar letter was written by the Duke of Gaete, minister of finance, to the director-general of the customs.<sup>1</sup>

When the various statements of the French Government as to the revocation of the imperial decrees are carefully compared, it is difficult to escape the conclusion.

that the Government of the United States, in acting on the assumption that the decrees were actually revoked, was influenced by the hope that by giving those statements a favorable construction it might ultimately escape the necessity of giving them any other. They nowhere declared that the decrees were revoked, but clearly indicated the contrary. Ten years later Albert Gallatin, while minister to France, discovered a secret decree, dated at Trianon the 5th of August 1810, the very day on which the Duke of Cadore's letter to Armstrong in regard to the repeal of the Berlin and Milan decrees was written, reciting that the United States had, by an act of March 1, 1809, ordered that from and after the 20th of May following, French vessels and merchandise entering their ports should be confiscated. This decree declared:

1. That moneys previously derived from the sale of American merchandise, and which had been deposited in the *caisse d'amortissement*, should be transferred to the public treasury.

2. That American merchandise which had been sequestered should be sold, and the proceeds turned into the public treasury.

3. That American vessels whose fate had not been determined should likewise be sold, and the proceeds paid into the public treasury.

4. That this provision should be carried out in respect of all American vessels entered and sequestered in French ports since March (probably May) 20, 1809, and up to May 1, 1810, the date of the act by which the United States revoked that of March 1, 1809.

5. That up to November 1, 1810, when the Berlin and Milan decrees were to be revoked on the conditions stated to the minister of the United States, American ships might enter French ports; but that they should not be permitted to discharge their cargoes unless they had obtained a license to do so, based on the fact that they had neither been denationalized by submission to the British orders in council nor contravened the Berlin and Milan decrees.<sup>2</sup>

Gallatin was a man of singular evenness of temper, but his expressions in regard to this decree betray the strength of the feelings which its discovery excited. "It is not," he said, "a condemnation either in form or in substance; but it certainly announces the intention to condemn. It bears date on the very day on which it was officially communicated to our minister that the Berlin and Milan decrees would be revoked on the 1st day of the ensuing November, and no one can suppose that if it had been

<sup>1</sup> Am. State Papers, For. Rel. III. 393.

<sup>2</sup> This secret decree of August 5, 1810, is not to be confounded with the Trianon decree of August 10, 1810, hereafter referred to, imposing certain duties on merchandise.

communicated or published at the same time the United States would, with respect to the promised revocation of the Berlin and Milan decrees, have taken that ground which ultimately led to war with Great Britain. It is indeed unnecessary to comment on such a glaring act of combined injustice, bad faith, and meanness as to the enactment and concealment of that decree exhibits."<sup>1</sup> Gallatin was Secretary of the Treasury under Madison, and in commenting on the secret Trianon decree it may be surmised that he recalled the harassing doubts of that time, when the administration, though acting on the assumption that the Berlin and Milan decrees had been revoked, could show no authentic proof of it. Even after the United States declared war against England no order was given to carry the revocation into effect,<sup>2</sup> though in May 1812 the Duke of Bassano had exhibited to Joel Barlow, then minister of the United States at Paris, a pretended decree of April 28, 1811, by which it was declared that the prior decrees had not been enforced as to American vessels since November 1, 1810.

On the 15th of April 1816, Monroe, as Secretary of Gallatin's Negotiations. State, instructed Gallatin, who had then been appointed envoy extraordinary and minister plenipotentiary to France, to renew the subject of the spoliation claims, which had for some time been suspended. The management of the negotiation was committed to Gallatin's discretion. On the 9th of November he addressed to the Duc de Richelieu, then minister of foreign affairs, a note in which he presented the claims with that clearness and precision with which he illuminated every subject which he undertook to discuss. He divided the claims into five classes: 1. Condemnations pronounced in violation of the provisions of the convention of September 30, 1800, down to July 31, 1809, when the convention expired. 2. The various condemnations, or rather confiscations, made under what were called "imperial decisions," by which were included, not the cases in which an appeal was taken from the Council of Prizes to the Council of State, but cases in which the order of condemnation proceeded from the latter, or from Napoleon himself, without a previous regular trial or a condemnation by the Council of Prizes. 3. Condemnations by the Council of Prizes itself without observing the forms of law. 4. Condemnations by the retrospective operation of various decrees. 5. Condemnations under the Berlin and Milan decrees, after as well as before their pretended revocation on November 1, 1810.<sup>3</sup> 6. Condemnations of vessels captured after November 1, 1810, on various pretenses, not covered by the general decrees.

For the purpose of adjusting these claims, Gallatin proposed that the Government of France should engage to make compensation to the citizens of

<sup>1</sup> Adams's Writings of Gallatin, II. 196.

<sup>2</sup> Adams's History of the United States, VI. 255-256.

<sup>3</sup> Referring to a list of 48 vessels and cargoes seized prior to that day, Gallatin stated that 28 were condemned by the Council of Prizes, 18 before and 10 after April 28, 1811; and 20 by imperial decisions, 11 before and 9 after the same date. Yet, by the pretended decree of April 28, 1811, it was declared that from and after November 1, 1810, the Berlin and Milan decrees were considered as if they had not existed (*comme non avenues*) in respect of American vessels.

the United States: 1. For all vessels and cargoes captured, seized or sequestered, which had not been definitively condemned by the Council of Prizes, and the proceeds of which were placed either in the public treasury, in the *caisse d'amortissement*, or in any other public chest; and also for all vessels and cargoes destroyed at sea, and likewise not condemned by the Council of Prizes. 2. For the losses sustained by reason of such other irregular or unlawful seizures, captures, or condemnations as should be decreed by a joint commission to have been made contrary to public law and justice, or in contravention of treaties. He proposed that the joint commission (or commissions) should have power (1) to liquidate the amount due for property either destroyed at sea or sequestered and not definitively condemned, and (2) to decide in what other cases France was justly bound to make compensation, and also to what amount.<sup>1</sup>

On the 20th of January 1817 Gallatin, having received no answer to his note, had an interview with the Duc de Richelieu. The Duke stated that he could not go beyond indemnity for vessels burnt at sea, and for those the proceeds of which had been merely sequestered. He offered to make such a proposal in writing; but he subsequently decided not to do so, on the ground that, although a large part of the claims of European powers for Bonaparte's acts had been abandoned, the remainder, which France had agreed to settle, were so enormous in amount as to render the government unable to contract a new obligation.<sup>2</sup> He gave an assurance, however, that the postponement of the American claims was not to be understood as a rejection of them, and that it was the government's intention to discharge the just demands of the United States so soon as it should be extricated from its present embarrassments.

Under these circumstances, when Gallatin left  
 French Counter-claims. France in 1823 the claims remained unsettled. His successor, James Brown, was equally unsuccessful.

But, besides presenting grounds for delay, France also put forward certain counterclaims, the adjustment of which she refused to separate from that of the claims of the United States. Apart from the alleged unlawful seizure and destruction of certain French vessels and other property, the principal counterclaims were those that related to the eighth article of the treaty of cession of Louisiana and to the supplies furnished by Caron de Beaumarchais during the American Revolution.<sup>3</sup>

Article VII. of the Louisiana Treaty. By the seventh article of the Louisiana treaty, the ratifications of which were exchanged at Washington

October 21, 1803, it was provided that for a period of twelve years, beginning three months after notice of the exchange was given at Paris, the ships of France and Spain should be entitled to certain exclusive privileges in the ports of the ceded territory. By Article VIII. it was stipulated that "in future and forever after the expiration of the twelve years the ships of France shall be treated upon the footing of the most favored nation in the ports above mentioned." On the 15th of December 1817 M. Hyde de Neuville, the French minister at Washington, complained that French vessels were not treated in the ports of Louisiana

<sup>1</sup> Am. State Papers, For. Rel. V. 284-287.

<sup>2</sup> Id. 288.

<sup>3</sup> Id. 674.

on the footing of the most favored nation. The ground of this complaint was the fact that British and certain other foreign vessels, under reciprocal agreements between their governments and the Government of the United States, enjoyed in the ports of the United States, including of course those in Louisiana, certain exemptions from duty to which vessels of France and of other nations with which there was no such arrangement were not admitted. Under the eighth article France demanded for her vessels in the ports of Louisiana the rate of duty conceded to the most favored nation. The United States replied that neither British nor other foreign vessels enjoyed in Louisiana ports any gratuitous advantage; that the article in question did not contemplate the concession to France as a mere gift of what was accorded to other nations for a full equivalent; that France might obtain, not only in the ports of Louisiana, but in all other ports of the United States, the same advantage as was enjoyed by other vessels on the same condition, namely, reciprocity; and that a more extensive construction of the article would violate that clause of the Constitution which requires all duties, imposts, and excises to be uniform throughout the United States.<sup>1</sup>

In the early stages of the American Revolution Beaumarchais, who possessed capacity for intrigue and adventure as well as for the drama, undertook to supply the United States with arms and munitions of war, under the fictitious commercial title of Roderique Hortalez & Co. A question subsequently arose as to how far he was entitled to payment for these supplies, it being alleged that he obtained some of them with money which was advanced to him by the French Government as a gift to the United States; and, while a partial settlement was made with him in 1779, a large part of his accounts remained at the close of the Revolution unadjusted. They afterward formed the subject of many executive and legislative reports, besides reappearing at intervals in the records of diplomacy.<sup>2</sup>

In 1829 the negotiations in regard to the spoliation of claims passed into the hands of William C. Rives, then appointed minister to France, a man of strong natural powers and cultivated intelligence, who, by reason of the clearness of his comprehension, the breadth of his views, and the elevation of his motives, as uniformly exhibited during a long career in the public service, is entitled to a high rank among American statesmen. His instructions on the subject of claims were signed by Mr. Van Buren, as Secretary of State, and bore date the 20th of July 1829. They divided the claims into five classes: 1. Claims prior to September 30, 1800, recognized by the fourth and fifth articles of the convention of that date, but either pretermitted by the convention of April 30, 1803, or through various causes not included in the settlement made at Paris by the board of claims, and remaining in force by virtue of the convention of 1800 and the tenth article of that of 1803. These claims were estimated at \$1,488,833.99. 2. Claims accruing between September 30, 1800, and April 30, 1803, for debts contracted

<sup>1</sup> Am. State Papers, For. Rel. V. 152, 640; H. Ex. Doc. 147, 22 Cong. 2 sess.

<sup>2</sup> Wharton's Dip. Cor. Am. Rev. I. 364-386; Loménie's Beaumarchais and His Times, III. 106, 122, 200, 211, 263.

within that period, and referred to in the twelfth article of the convention of 1803. These claims were placed at \$134,786.06. 3. Claims accruing between September 30, 1800, and April 30, 1803, from causes other than debts and captures, amounting to \$75,704.53. 4. Claims between April 30, 1803, and the year 1805, amounting to \$1,065,081.98. 5. (A) Claims subsequent to 1805 growing out of decrees of the French Government and on which no final condemnation was passed, amounting to \$6,256,647.69. (B) Claims of the same nature, but finally condemned by the Council of Prizes, the Council of State, or by imperial decisions or orders, amounting to \$3,026,231.84. The whole, exclusive of interest, amounted to \$12,047,286.09. Mr. Van Buren said that the chief objections to the claims were (1) that they were stale and ought to have been pressed at an earlier period; (2) that similar claims against England and Naples had not been enforced; (3) that the present Government of France was not responsible for the acts of what was called the usurping government; (4) that the claims were very large, that the allowance of them would involve the acknowledgment of a responsibility on the part of France which she would be unable to discharge, and that the United States should accept a compromise, as the European powers had done; (5) that in certain classes of cases since 1805 there was no ground of claim.

Mr. Rives, on his arrival in Paris, took up the subject with much energy. He held numerous conferences with the Prince de Polignac, then president of the council of ministers, and wrote a number of notes. Early in the negotiations the Prince admitted liability in cases where the property had not been finally condemned, and where vessels and cargoes were destroyed at sea. He subsequently went somewhat further, and intimated that he would propose a mixed commission to examine and liquidate all the claims. Mr. Rives then drew up a project of a convention, by the first article of which it was provided that France should make compensation to citizens of the United States "for all losses and damage sustained by reason of illegal or irregular captures, seizures, and sequestrations of their vessels and cargoes under the authority of France, in all cases where the said vessels and cargoes have not been definitively condemned by the Council of Prizes, as also for all losses and damage sustained by the unlawful destruction of their vessels and cargoes at sea, and for all supplies derived from citizens of the United States, or debts otherwise due by virtue of contract." By the second article it was provided that France should also make compensation for losses and damages sustained by condemnations: (1) Where such condemnations were in violation of the convention of September 30, 1800; (2) where the condemnations were not pronounced by a regular prize tribunal; (3) where the proceedings were irregular; (4) where the sentences of condemnation gave a retrospective effect to the decrees under which they were made; (5) where condemnations were made under the Berlin or Milan decrees, after the French Government had pronounced them repealed; (6) where, for other causes, the commission should determine that France was "justly" liable. The draft provided for the appointment of commissioners and arbitrators. Prince de Polignac appointed a committee of three to examine the claims and report to him; but he also strongly pressed the question as to the Louisiana treaty. In order to get rid of this difficulty Mr. Rives suggested that, if the claims were promptly settled and the

Louisiana question abandoned, the United States might in a spirit of friendly liberality grant some commercial advantage, such as a reduction of the duties on French wines. This suggestion Mr. Rives made on May 20, 1830, without instructions.

**Conclusion of a Convention.**

On the 30th of July 1830 Mr. Rives reported that the prospect of settling the claims had for the present ceased, in consequence of the revolution. At that moment a tricolored flag waved from the palace, and Paris was again tranquil under a provisional government, after passing through three days of commotion and bloodshed. But in the midst of the political changes that were taking place it was impossible again to secure attention to the subject of claims before the middle of September. A new commission, however, was then appointed to examine the subject, the report of the former commission having been adverse to the claims. The new commission did not report till near the end of March 1831. A majority defended the system of imperial decrees, while a minority pronounced it illegal; hence the commission reported against redress where there was a regular application of the system, but recommended it where vessels were burnt at sea, where they were irregularly condemned, or where they were condemned after the decrees were said to have been repealed. The majority recommended the payment of between 10,000,000 and 15,000,000 francs, the minority of about 30,000,000. In April 1831 the government made an offer of 15,000,000 francs. Mr. Rives immediately rejected it. Early in May the offer was raised to 20,000,000 francs, and when this was refused it was raised to 24,000,000, payable by installments in six years. This offer was made as an ultimatum. Mr. Rives mentioned 40,000,000 francs as a sum on which he would compromise, and when this was refused he revived the proposition for a mixed commission. Subsequently he proposed to meet the government halfway between the sums respectively proposed by the minister for foreign affairs and by himself. The minister for foreign affairs, apprehending opposition from the chambers, added 1,000,000 francs to the previous 24,000,000, as an ultimatum. On receiving this offer Mr. Rives brought up the question of interest, and on June 13, 1831, he submitted a draft of a convention in which it was proposed that France should pay 25,000,000 francs in six installments, with interest on each installment from the date of the convention at the rate of 4 per cent, the money to be distributed by the United States. On June 15, Count Sebastiani, the minister for foreign affairs, brought forward the various claims against the United States, including that of the heirs of Beaumarchais, amounting in all to 4,689,241.41 francs, and after much discussion he agreed to accept the sum of 1,500,000 francs in satisfaction of all the French claims. But the question as to the eighth article of the Louisiana treaty yet remained. The French Government insisted on its settlement at the same time as the claims. It was finally arranged in accordance with Mr. Rives's suggestion of May 1830, the French construction of the article being abandoned in consideration of a reduction of the duties on French wines for a period of ten years. The convention, the conclusion of which gave great satisfaction to the United States, was signed July 4, 1831. The ratifications were exchanged at Washington February 2, 1832.<sup>1</sup>

<sup>1</sup> H. Ex. Doc. 147, 22 Cong. 2 Sess.



Provision for a Commission.

By an act of July 13, 1832, provision was made for carrying the convention into effect.<sup>1</sup> This act provided for the appointment of "three commissioners, who shall form a board, whose duty it shall be to receive and examine all claims which may be presented to them under the convention, \* \* \* which are provided for by the said convention, according to the provisions of the same, and the principles of justice, equity, and the law of nations." Provision was made for a secretary, versed in the English, French, and Spanish languages, and also for a clerk. The commissioners were required to meet in Washington on the first Monday in August 1832, and to terminate their duties within two years thereafter. They were empowered to make rules and regulations; and it was provided that all papers in the Department of State relating to the claims should be delivered to them. At the close of their labors they were directed to certify a list of their awards to the Secretary of the Treasury, on whom was imposed the duty of distributing among the persons in whose favor the awards were made, in ratable proportions, the moneys received from France. The salary of each commissioner was fixed at \$3,000 a year; of the secretary at \$2,000, and the clerk at \$1,500.

Appointment of Commissioners.

As commissioners the President appointed G. W. Campbell, of Tennessee; John K. Kane, of Pennsylvania, and R. M. Saunders, of North Carolina.<sup>2</sup> As secretary he appointed John E. Frost. Mr. Campbell, the oldest of the commissioners, had had a long career in the public service. A native of Tennessee, where he was born in 1768, and a graduate of Princeton, he had been a Representative in Congress, a Senator of the United States, Secretary of the Treasury, and minister to Russia. Mr. Kane was a native of the State of New York and a graduate of Yale, but after studying law he entered upon the practice of his profession in Philadelphia, of which city he was solicitor from 1828 to 1830. In Federal politics he figured as a prominent supporter of President Jackson. He formed an active and useful member of the board, and, it is understood, wrote its final report. His "Notes" on its decisions will be referred to hereafter. In 1845 he became attorney-general of Pennsylvania, and in the following year was appointed district judge for the United States at Philadelphia. Mr. Saunders was a native of North Carolina and a graduate of the university of that State. He held numerous public positions, serving at different times as attorney-general of North Carolina, a member of the State legislature, a Representative in Congress, and a judge of the superior courts of the State. He introduced in the Baltimore convention in 1844 the two-thirds rule which was adopted by that body, and which has ever since been adhered to in Democratic national conventions. In 1845 he was appointed minister to Spain.

<sup>1</sup> 4 Stats. at L. 574. •

<sup>2</sup> Mr. Saunders was not one of the original members of the board, but was appointed to succeed Thomas H. Williams, who held the position only for a short time.

The board having met at the time required by the Rules of Procedure. act of Congress, it adjourned on the 18th of September 1832, to meet again on the third Monday in the following December, for the purpose of examining the memorials which might in the mean time have been filed with the secretary, and of deciding whether they conformed to the rules adopted by the commissioners for the government of their procedure. The rules were as follows:

"OFFICE OF THE COMMISSIONERS UNDER THE ACT  
TO CARRY INTO EFFECT THE CONVENTION WITH FRANCE,

*"Washington City, 18th September 1832.*

"*Ordered*, That all persons having claims under the convention between the United States and His Majesty the King of the French, concluded on the 4th of July 1831, do file memorials of the same with the Secretary of the Board. Every memorial so filed must be addressed to the Commissioners; it must set forth minutely and particularly the facts and circumstances whence the right to prefer such claim is derived to the claimant; and it must be verified by his affidavit.

"And in order that the claimants may be apprised of what the Board now considers necessary to be averred in every such memorial, before the same will be received and acted on, it is further

"*Ordered*, That in every such memorial it shall be set forth:

"1. For and in behalf of whom the claim is preferred.

"2. Whether the claimant is a citizen of the United States of America, and, if so, whether he is native or naturalized, and where is now his domicile; if he claims in his own right, then whether he was a citizen when the claim had its origin, and where was then his domicile; or if he claims in the right of another, then whether such other was a citizen when the claim had its origin, and where was then, and where is now, his domicile.

"3. Whether the entire amount of the claim does now, and did at the time when the claim had its origin, belong solely and absolutely to the claimant; and if any other person is or has been interested therein, or in any part thereof, then, who is such other person, and what is or was the nature and extent of his interest; and how, when, by what means, and for what consideration, the transfer of rights or interest, if any such were, took place between the parties.

"4. Whether the claimant, or any other who may at any time have been entitled to the amount claimed, or any part thereof, hath ever received any, and, if any, what sum of money or other equivalent as indemnification for the whole or any part of the loss or injury upon which the claim is founded; and if so, when and from whom the same was received.

"And that time may be allowed to the claimants to prepare and file the memorials above mentioned, it is further

"*Ordered*, That, when this Board shall close the present session, it will adjourn to meet again on the 3rd Monday of December next, at which time it will proceed to decide whether the memorials which may have been filed with the Secretary are in conformity to the foregoing orders, and proper to be received for examination, and to transact any other business that may come before it; and that the Secretary cause public notice hereof to be given in the journals authorized to publish the laws of the United States.

"By order of the Board:

"G. W. CAMPBELL.

"THOS. H. WILLIAMS.

"J. K. KANE.

"J. E. FROST, *Secretary.*"

Papers Relating to  
Spanish Claims.

By a joint resolution of February 19, 1833, Congress authorized the Secretary of State to deliver to the commissioners "the evidences of any claims submitted to and rejected by the commissioners for the settlement of claims under the treaty with Spain which was made on the 22d day of February 1819,

and finally ratified and confirmed on the 22d day of February 1822, which evidences shall be returned to the Department of State when the commission shall expire."<sup>1</sup> The obvious purpose of this resolution was to place in the hands of the commission all the evidence in regard to claims which, after having been presented to the commission under the treaty of 1819 with Spain as claims against that country, should be presented to the commissioners under the convention with France as claims against the French Government.<sup>2</sup>

Work of the Commission.

The labors of the commission proved to be very onerous, and its existence was twice prolonged, first for a year<sup>3</sup> and then till the 1st of January 1836.<sup>4</sup> As the board adjourned December 31, 1835, the whole period of its duration was about three years and five months. Accompanying a report made by the commissioners on June 7, 1834, in response to a resolution of the Senate, there is a list of all the claims that had been presented to the board divided into three classes—those that had been recognized as *prima facie* falling within the treaty, those that had been suspended, and those that had been rejected. The total amount of the claims presented, principal and interest, was \$51,834,170.15. Of those recognized as falling within the treaty, the principal amounted to \$17,065,917.36, and the interest to \$24,574,920.99; in all, \$41,640,838.35.<sup>5</sup> At the close of the sessions of the commission it appeared that the whole number of claims presented was 3,148, of which 1,567 were allowed and 1,581 disallowed.<sup>6</sup> The total amount awarded was \$9,352,193.47.<sup>7</sup>

Delay in Execution of Convention.

The first of the six annual installments of the sum due from France under the convention became payable on the 2d of February 1833, a year after the exchange of the ratifications. When the commission adjourned nothing had as yet been paid, but the controversy between the two governments in regard to the execution of the convention by France was nearing its close. This controversy grew out of opposition to the convention in the French Chamber of Deputies. When the first installment fell due, the United States, standing upon the engagements of the convention, negotiated a draft through the Bank of the United States on the French minister of finance. At that time the French Government had not ventured to ask for an appropriation, and the draft was allowed to go to protest.<sup>8</sup> The Duc de Broglie, then minister for foreign affairs, complained of this action on the part of the United States. He urged that under the French constitutional system the financial clauses of the convention could not be

<sup>1</sup> 4 Stats. at L. 668.

<sup>2</sup> Am. State Papers, For. Rel. VI. 185.

<sup>3</sup> Act of June 19, 1834, 4 Stats. at L. 679.

<sup>4</sup> Act of March 3, 1835, 4 Stats. at L. 778.

<sup>5</sup> S. Ex. Doc. 417, 23 Cong. 1 sess.

<sup>6</sup> S. Ex. Doc. 204, 24 Cong. 1 sess.

<sup>7</sup> H. Ex. Doc. 117, 24 Cong. 1 sess.

<sup>8</sup> The draft was in the form of a bill drawn by the Secretary of the Treasury of the United States on the minister of state and finance of France, in favor of Samuel Jaudon, cashier of the Bank of the United States, or order. (United States v. Bank of the United States, 5 Howard, 382.)

carried into effect in that country any more than in the United States without the cooperation of the legislative branch of the government, but that the French Government had promised to do all that it could to effect the execution of the convention. The United States took the ground that the convention, having been constitutionally concluded and ratified, was obligatory on every department of the contracting governments.<sup>1</sup> In April 1833 the French Government presented to the Chamber of Deputies a bill to carry the convention into effect, but it was not deemed prudent then to press the measure to a vote, and the same course was taken at the next session. In January 1834 the bill was for the third time submitted to the Chamber of Deputies. On the 10th of March the committee to whom it was referred recommended its adoption, but in the following April, when it was pressed to a vote, it was rejected by a vote of 176 to 168.<sup>2</sup> At a brief and merely formal meeting of the chambers in July the bill was not renewed, but the government promised to submit it again at the session beginning in December.<sup>3</sup> In the mean time Edward Livingston arrived at Paris as minister of the United States. When he presented his letter of credence to the King, the latter warmly expressed his good feeling toward the United States, and declared that the convention would be faithfully performed, though circumstances had prevented its immediate execution. He stated, not only as king, but as an individual whose promise would be fulfilled, that the necessary laws would be passed at the next meeting of the chambers. Livingston duly reported these assurances to his government, but stated that he did not hope for any decisive action before the middle of January. One motive for the delay was, he said, an expectation that the President's message might arrive before the discussion, and that it might contain something to show "a strong national feeling on the subject." This was "not mere conjecture;" he knew it to be a fact. As he had previously intimated, on the tone of the President's message would largely depend not only the payment of the claims, but "the national reputation for energy."<sup>3</sup>

**Jackson's Recommendation of Reprisals.**

Acting upon this advice, it is probable that President Jackson exceeded the expectations of those who hoped for an exhibition of "energy." In his message to Congress he declared that the executive branch of the government had exhausted all the authority which it possessed in the matter, and which there was any reason to believe could be beneficially employed; and that, while he was confident that the idea of acquiescing in the refusal to execute the convention would not for a moment be entertained by any branch of the government, "any further negotiation" on the subject was "equally out of the question." He therefore recommended that he be invested with power to make reprisals, in case France should continue to withhold payment of the installments that were due.

This recommendation was duly referred both in the Action of the Senate. Senate and in the House of Representatives to the appropriate committees. The first action upon it was taken in the Senate, where, on January 6, 1835, a report was made by Mr. Clay from the Committee on Foreign Relations. The report was very

<sup>1</sup> H. Ex. Doc. 40, 23 Cong. 2 sess.

<sup>2</sup> H. Ex. Doc. 2, 23 Cong. 2 sess.

<sup>3</sup> H. Ex. Doc. 136, 23 Cong. 2 sess.

temperate and very able. It stated that the committee entirely concurred with the President as to the justice of the claims. Nearly two years had elapsed since the first installment of the indemnity became due. The President thought that the time had arrived to make reprisals, which would not, in his opinion, give France any just cause for war; but he also left to Congress the consideration of awaiting further action of the French chambers. The committee had reviewed the whole correspondence. The Government of France had endeavored to secure the execution of the treaty. The delays in doing so were satisfactorily accounted for. When the bill to carry the convention into effect was rejected, the minister of foreign affairs immediately resigned his place in consequence of the vote of the chamber. During the debate the principle of indemnity seemed to have been generally admitted, but opinions differed as to the amount. Some of the members appeared to think that France was a prey to the rapacity of foreign powers; that the United States owed her a debt of gratitude and ought at least to have moderated their demands; that the decrees of France were no more than a just retaliation for the edicts of Great Britain; that the claims were in the hands of a few speculators, and that on a fresh negotiation the amount would be materially reduced; and that as to 8,000,000 of the 25,000,000 francs, the United States was seeking a double satisfaction, first from Spain under the Florida treaty, and then from France under the present convention; but the controlling motive of the majority appeared to be the impression that the amount was too large. The French Government believed, said Mr. Clay, that the United States would await the renewal of its efforts to obtain an appropriation. It was manifest that the President's recommendation of the contingent measure of reprisals was due to the failure of pledges which he understood had been given; but ought the committee to advise the adoption of such a measure because the King did not call the legislative bodies together some sixty or ninety days earlier than the period of their accustomed meeting? Such a call might not have been attended with beneficent results. The committee, said Mr. Clay, recommended adherence to negotiation. The President thought reprisals a pacific measure. Nevertheless, while reprisals did not of themselves produce a state of public war, they not infrequently were the immediate precursors of it. It was inconceivable that a nation like France would submit without retaliation, and this would inevitably terminate in war. Reprisals, the report declared, so far partook of the character of war that they were an appeal from reason to force. In conclusion, the committee recommended the adoption of a resolution to the effect that it was inexpedient at that time to pass any law vesting in the President authority to make reprisals on French property in the contingency of provision not being made for paying the indemnity during the pending session of the French chambers. The vote in the Senate on this recommendation was taken on the 14th of January. The debate was participated in by leading members of that body, and the resolution was amended so as to read: "It is inexpedient at present to adopt any legislative measures in regard to the state of affairs between the United States and France." In this form the resolution was unanimously adopted.<sup>1</sup>

<sup>1</sup> Congressional Debates, XI. Part 1, pp. 103, 200.

In the House of Representatives action was postponed until the end of February. In a message of the 25th of that month the President stated that he had instructed Livingston to quit France with his legation and return to the United States if an appropriation for the fulfillment of the convention should be refused by the chambers.<sup>1</sup> On the following day a report on the relations with France was made by Cambreleng, from the Committee on Foreign Affairs, and a minority report, signed by Edward Everett, R. P. Letcher, and R. Coulter, was also presented.<sup>2</sup> On the 28th of February, after a debate which extended far into the night, the House adopted a resolution to the effect that the execution of the convention should be insisted on, and that preparation ought to be made for any emergency growing out of the state of the relations between the two countries.<sup>3</sup>

In France, the President's message of December 1834 was received as a measure of hostility, and though Mr. Livingston expressed regret that it should be so interpreted, the French minister at Washington was recalled, Livingston was offered his passports, and the Chamber of Deputies was informed that all diplomatic intercourse with the United States had been suspended. A bill was then introduced in the Chamber of Deputies to carry the convention into effect, by which it was provided that the money should not be paid till it was ascertained that the United States had done nothing to injure the interests of France. This proviso obviously referred to any possible action by Congress on the President's recommendation of reprisals. When, however, on March 28, 1835, the bill was put upon its passage, though it was known that Congress had not adopted that recommendation, an amendment was carried to the effect that no money should be paid till satisfactory explanations should be received of the President's message. Such explanations the President declined to give. He had already caused it to be officially made known to the French Government that he approved Livingston's voluntary disavowal of any intention on the part of the United States to intimidate; and he refused to go further. While he was ready to dissipate any inferences injurious to the honor of France, he was unwilling to do it in such a manner as to seem to admit an obligation to apologize for or explain an official communication to Congress. An agent was appointed by the United States to receive the money, but he was informed by the French Government that it could not be paid because the "formalities" required by the act of the chambers had not been arranged.

When the President on December 7, 1835, sent his annual message to Congress, the state of affairs apparently remained unchanged. He devoted a long passage to a review of the controversy, and, while maintaining his position, declared the conception that he had intended "to menace or insult the Government of France was as unfounded as the attempt to extort from

<sup>1</sup> H. Ex. Doc. 174, 23 Cong. 2 sess.

<sup>2</sup> Congressional Debates, XI. Part 2, p. 1515, and App. p. 177; H. Rep. 133, 23 Cong. 2 sess.

<sup>3</sup> Congressional Debates, XI. Part 2, pp. 1531-1634.

the fears of that nation what her sense of justice might deny would be vain and ridiculous." At the same time he stated that the chargé d'affaires of the United States at Paris, who remained after Livingston's withdrawal, had been instructed to ask for the final determination of the French Government, and in the event of their continued refusal to pay the installments due, to return to the United States.<sup>1</sup>

On the 8th of January 1836 President Jackson sent *Diplomatic Rupture.* a special message to Congress, by which it appeared that France was willing to pay the money if the United States would officially and in writing express its regret for the misunderstanding which had arisen, and disclaim any intention to question the good faith of the French Government, or to take a menacing attitude toward France; that the French Government had been officially informed that these terms could not be complied with, and that Mr. Barton, the chargé d'affaires of the United States, had left Paris. Diplomatic relations between the two countries were completely broken off. Under the circumstances the President suggested that, as the money had been appropriated, but was withheld on grounds which it was not believed would be permanently maintained, it would suffice, till such a determination should have become evident, to prohibit the introduction of French products and the entrance of French vessels into the ports of the United States.<sup>2</sup>

All occasion for the consideration of such measures *British Mediation.* soon passed away. As the French Government had originally taken offense at a passage in the President's message, it received the expressions in his message of December 7, 1835, in regard to his supposed intention to menace France, as a satisfactory explanation. This fact appears by correspondence communicated to Congress on February 22, 1836, in regard to the mediation of Great Britain.<sup>3</sup> On the 27th of the preceding month, Mr. Bankhead, the British chargé d'affaires at Washington, informed the United States that he was instructed to express the hope that, if the parties would agree to refer to the British Government the settlement of the point at issue between them and to abide by its opinion on the subject, means might be found of satisfying the honor of each. President Jackson accepted the mediation, with a reservation as to the requirement of expressions of regret and explanations, a condition which, he said, could never be complied with. On the 15th of February Mr. Bankhead stated that the French Government had declared that the frank and honorable manner in which the President had in his recent message expressed himself with regard to the points of difference between the two governments had removed the difficulties on the score of national honor, and that the French Government was ready to pay the installments due whenever they should be claimed by the United States. The French Government accepted the mediation, but by this declaration, which was made to the British Government as a channel of communication, the necessity of a formal mediation was dispensed with.

<sup>1</sup> H. Ex. Doc. 2, 24 Cong. 1 sess.

<sup>2</sup> S. Ex. Doc. 62, 24 Cong. 1 sess.; S. Ex. Doc. 63, 24 Cong. 1 sess.

<sup>3</sup> S. Ex. Doc. 187, 24 Cong. 1 sess.

On May 10, 1836, President Jackson, with many friendly expressions toward France, informed Congress that the first four installments under the convention had been received.<sup>1</sup> The rest of the money was duly paid.<sup>2</sup> The six installments, with interest, yielded \$5,558,108.07. As the aggregate of the awards was \$9,362,193.27, the dividends, to the payment of which the fund was devoted, amounted to 59,807.71 of the whole sum awarded.<sup>3</sup>

While the convention was pending before the French Chamber of Deputies, M. Dumon presented an analytical statement of the claims to which it related, divided into categories and classes. Taking this table as a basis, Mr. Kane endeavored to make a similar classification of the awards of the commission, but he found it impracticable to do so in many cases. For example, M. Dumon divided into classes the cases falling within the category of vessels burnt, sunk, and destroyed. Mr. Kane found it impossible to classify the awards of the commission in such cases, since the French cruisers rarely assigned reasons or motives, and it was therefore not practicable to look beyond the fact of destruction and the absence of justifiable cause. The analysis made by Mr. Kane was as follows:<sup>4</sup>

Category I:		
Vessels burnt, sunk, and destroyed.....		\$805, 222.39
Category II:		
Vessels condemned for violating decrees of which they had no notice at the time of sailing—		
Class 1. Vessels condemned under the Milan decree, though they had sailed from the United States within 80 days of its date .....		1, 219, 934.46
Class 2. Condemnations in the West Indies in 1803 and 1804, of vessels bound for ports of Hispaniola which, at the time of their sailing, were not known to be included in the French orders of nonintercourse .....		147, 387.88
Category III:		
Vessels seized by a retrospective application of the Rambouillet and Trianon decrees—		
Class 1. Sequestrations at Antwerp in 1807 .....		600, 402.45
Class 2. Sequestrations at St. Sebastian's and other ports of Spain in 1809-1810 .....		1, 826, 303.31
Class 3. Property ceded by Holland to France under the treaty of March 1810.....		536, 907.01
Category IV:		
Condemnations under the Berlin and Milan decrees after November 1, 1810—		
Class 1. Property seized before but condemned after that date .....		844, 857.10
Class 2. Property seized and condemned after that date .....		570, 763.59
Category V:		
Seizures and condemnations under the Milan decree prior to November 1, 1810.....		977, 921.00

<sup>1</sup> H. Ex. Doc. 254, 24 Cong. 1 sess.

<sup>2</sup> S. Ex. Doc. 351, 25 Cong. 2 sess.; H. Ex. Doc. 417, 25 Cong. 2 sess.; H. Ex. Doc. 183, 26 Cong. 1 sess.

<sup>3</sup> H. Ex. Doc. 183, 26 Cong. 1 sess.

<sup>4</sup> H. Ex. Doc. 117, 24 Cong. 1 sess.



## Category VI:

Military exactions and forcible appropriations of property without condemnation—

Class 1. Property on land or in port, as at Leghorn, Barcelona, Malaga, St. Domingo, and elsewhere....	\$344, 885. 94
Class 2. Property at sea.....	199, 969. 71

## Category VII:

Property captured at sea, but not adjudicated on, either because recaptured by the British, or lost while in the possession of the captors, or for causes unknown.....	215, 936. 40
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## Category VIII:

Property unlawfully captured and unreasonably detained—absolute damage during detention, and costs and expenses actually paid.....	217, 718. 86
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## Category IX:

Property condemned by the French courts under homologated promises—a part being released.....	434, 232. 68
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## Category X:

Property for which compensation was still due under the convention of September 30, 1800. By Article IV. of that convention, property captured before exchange of ratifications was to be restored on certain proof of property, and, if condemned, to be restored or paid for. By the convention of 1803 indemnity was limited to cases arising before September 30, 1800. Claims, therefore, for property captured after September 30, 1800, and before the exchange of ratifications, were not affected by the convention of 1803, and were in fact excluded from its benefits.....	332, 623. 16
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## Category XI:

Confiscations by order of Napoleon, without assignment of cause.....	77, 427. 53
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Many claims for spoiliations committed in 1800, but not comprised in category X.; and many claims for spoiliations prior to 1800 were placed by the commission at once on the rejected list.<sup>1</sup>

On the 30th of December 1835, the day before the Commissioners' Report. board's final adjournment, the commissioners signed the following report, which they directed to be recorded:

"The Undersigned Commissioners, Citizens of the United States, appointed by the President, by and with the advice and consent of the Senate, under the act of Congress to carry into effect the Convention between the United States and his Majesty the King of the French, concluded at Paris on the 4th of July 1831, have the honour to submit to the Secretary of State the following Report:

"For the manner in which the Board was organized; for the rules and regulations adopted by it from time to time, and for the circumstances attending the discharge of its several duties, they beg to refer to their Journal which accompanies this report.

"The questions which arose in the progress of their examinations were numerous and many of them novel, complicated and difficult, but the principles which they involved, so far as they regulated the decisions of the Board, it is believed, may be satisfactorily included in a brief summary. It was held, that the relief provided for under the Convention could be awarded only to American citizens, for injuries to American property, and where the right to indemnity had never been transferred to the subject of a foreign Government; that, to constitute a valid claim, the

<sup>1</sup>S. Ex. Doc. 417, 23 Cong. 1 sess. See H. Ex. Doc. 147, 22 Cong. 2 sess. 87, 90.

owner of the property must have been entitled at the time of the spoliation to the protection and aid of the United States; that the act complained of was clearly authorized by France, or directly sanctioned by those acting under her authority either judicial, civil or military; that it was plainly unlawful, in violation of the Law of Nations or of Treaty Stipulations between France and the United States; that the injury was not the loss of expected gains but substantial, and susceptible of pecuniary indemnity, and that the claim remained unimpaired and in full force against France at the date of the Convention of 1831—such was the general character of the reclamations which have been recognized by the Board and which constitute the basis of their awards. To establish them, the claimant was uniformly required to produce the highest evidence which was accessible to him; the record of condemnation where any existed, certified in legal form, and when that did not exist or could not be had, some original document exhibiting the facts and circumstances and whose authenticity admitted of no doubt. Where the original records had been mislaid or destroyed, or the claimant's efforts to procure copies of them had failed, or where from the nature of the act it was not susceptible of verification by records, secondary evidence was admitted with the greatest caution.

"From the manner in which the records of the French Prize Courts are made up, they became proofs of the highest value; they recite the facts as they appeared in evidence, the allegations and admissions of the parties and the grounds on which the Judgment of the Court was based. In general, therefore, they ascertain the facts on which the charge of unlawful injury, if any there be, must be sustained. As the claimant was not permitted to substitute before the Commission an amended case, from that which had been submitted to the adjudication of the French Tribunal, his failure to produce the decree of condemnation was followed by a disallowance of his claim unless it was clearly shown to have been beyond his power, for whilst these decisions of the French Tribunals were not held as conclusive against the party, where made under decrees in clear violation of the established principles of national law, still they were required to be produced that the grounds of the proceedings might be seen and fully understood. For every purpose the evidence filed by the claimant was compared with that received through the Department of State from the French Government, including always the papers found on board of the vessels at the time of the capture; so, too, the evidence filed by one claimant was always collated with that filed by others claiming under the same spoliation and where any circumstance suggested such a course, the proofs in several were examined together.

"In fixing the amount of these allowances and in determining as to the persons to whom they should be payable, it has been the object of the Board to award to each a just indemnity for the loss actually sustained. However reasonable may have been the calculation of profits or whatever may have been the circumstances of the spoliation, no damages have been added to the measure of actual loss, and though many years have elapsed since the claims were made known to the French Government, interest has in no case been allowed. In ordinary cases, the value of the property at the time of the unlawful taking and the expenses incurred in a reasonable effort to defend or reclaim it, have been taken as the measure of loss. When the property was seized on shore, at the place to which it was destined, and the market price could be satisfactorily shown, that was adopted as the criterion of its value. If from any cause this could not be ascertained, recourse was had to the cost and charges as in other cases. The vessel was generally estimated at her cost to the owner, deducting a reasonable percentage for any subsequent depreciation. To the value of the vessel was added two-thirds of her freight, where the voyage was incomplete; where full freight had been earned, but from some cause was not paid at the time, the allowance was increased accordingly.

"The Cargo when taken at sea was estimated at its invoice cost, with the usual and ordinary shipping charges. The customary brokerage on the purchase of goods, the expenses of the shipment with a fair premium of insurance for the particular voyage, ascertained at the time of shipment, and calculated to cover, made up these charges.

"As the premium was regarded as an equivalent for the hazards of the voyage, and as indicating the consequent increase of value, it was allowed, whether this risk had been incurred by an insurer or was borne by the owner himself. In cases of capture and release, where doubts existed as to the neutral character of the vessel or circumstances [existed] justifying the capture, nothing has been allowed, unless the delay was unreasonable; and then only for the wages of the crew, the expenses of their support and the damage incurred by the vessel during the detention. When the property was recaptured from the French and restored on the payment of salvage, the amount so paid, with the incidental charges, was held to be the measure of the owner's damage; so, too, in the case of ransom, the sum paid was awarded as the amount of compensation; but, when the property after the capture had been sold and a proportion of its proceeds given up as the price of a partial restitution, the indemnity was calculated as in an ordinary case of confiscation, deducting the sums received by the claimants under the compromise.

"In the distribution of the amounts awarded, reference was had to the claimant's actual loss. Whatever he had received under contracts of insurance was deducted from his award; and when the Insurers were claimants before the Board, their claims were generally allowed as valid for the sums they had paid; the only exception to this rule, was in cases of loss which had been specially adjusted between the parties by compromise or otherwise, and in such cases the object has been to carry into effect the intention of the parties at the time of the adjustment.

"Having thus stated the general principles by which the Board was guided in its decisions on the validity and amount of claims and in the distribution of its awards, the Undersigned subjoin a Descriptive list of the several books which have been prepared under their direction and which accompany this Report."

"A. Journal of the proceedings of the Board.

"B. A list of all the Memorials presented numbered progressively from 1 to 3148.

"C. A list of all the spoliations complained of in the Memorials above-mentioned.

"D. A list of the several awards made by the Board, arranged for convenience of reference, under the heads of the vessels which were the subjects of Spoliation or which had been at some time employed in transporting the property seized.

"From these it appears that the number of spoliations complained of in 3148 Memorials was 883; of which 1567 Memorials referring to 361 spoliations have been made the basis of Awards amounting to nine million three hundred and fifty-two thousand one hundred and ninety three dollars and forty seven cents.

"The Board then adjourned to meet to-morrow at 10 o'clock.

"G. W. CAMPBELL.

"J. K. KANE.

"R. M. SAUNDERS.

Attest:

"JOHN E. FROST, Secy."

When we consider the multitude of private interests at stake, and the circumstance that the fund fell far short of satisfying even the principal of the claims which were found to be valid, it is not surprising that complaints should have been made of the results of the board's deliberation. With a view to elucidate the subject and correct misapprehensions, Mr. Kane, shortly after the adjournment of the commission, published a pamphlet in which he set forth the general principles by which the board had been guided.<sup>1</sup>

<sup>1</sup> Notes on Some of the Questions Decided by the Board of Commissioners under the Convention with France, of the 4th July 1831. Philadelphia, 1836.

He discussed the subject under two general heads—first, the title of the claimant to participate in the fund; and second, the measure of compensation.

**National Character of Claim.** Under the first head, the first topic discussed was that of the national character of the claim. The commission required that the claim should be altogether American, that it should have originally belonged and have continued to belong to an American citizen. The question whether a foreigner domiciliated in the United States for commercial purposes was entitled to the benefits of the convention, did not arise before the commission. Several cases, however, occurred where the claimants, who were American citizens by birth, and had not renounced their allegiance, were at the time of the spoliation residing in foreign countries. Where the foreign nation, within whose territories the claimant was domiciliated, was at war with France, and the property was taken *jure belli*, the claim was disallowed.<sup>1</sup> But where the country in which he was a resident was neutral, he was held to retain the right to protection.<sup>2</sup> Where the claimant, though a resident citizen of the United States, was interested in a foreign commercial house, he was regarded, in respect of the property of such house, as domiciled in the country in which the house was situated. It was also held that a citizen might renounce the protection of his government by violating its laws. By the act of Congress of February 7, 1806, commercial intercourse was prohibited between "persons resident within the United States and persons resident within any part of that island (Hispaniola) not in the possession and under the acknowledged government of France." Where a vessel when captured was violating this statute, indemnity was refused. The same rule was applied in cases of violation of the embargo of December 22, 1807, and the nonintercourse act of March 1, 1809.

**Meaning of Term "Property."** The convention made provision only for cases of unlawful captures of American "property." By a majority of the board it was determined that property should be held to include "only those interests which were absolutely vested before the intervention of France, or which became so in consequence of that intervention. Commissions, therefore, as well as profits, wages of seamen, and a variety of minor contingent interests, were held not to possess the character of property." The claims of insurers were, however, regarded, whether the loss was total or partial, though the commissioners under the Florida treaty seemed to have treated insurers as assignees and recognized them as claimants only in case of total loss. The commissioners under the French convention acted upon a broader principle.<sup>3</sup>

**Agency of France.** The next subject discussed by Mr. Kane was that of the nature of the act which formed the subject of complaint. Was it the act of France? In a large proportion of the injuries, the agency of France was direct and obvious. Where there were judicial proceedings, the commissioners recognized the principle that a state is politically answerable only for the decisions of its

<sup>1</sup> The *Pizarro*, 2 Wheat. 228.

<sup>2</sup> *Murray v. Charming Betsey*, 2 Cra. 120.

<sup>3</sup> *Gracie v. New York Insurance Co.*, 8 Johns. 237, 245.

highest tribunals; but where the course of decisions in the highest court was absolutely uniform, and a reversal of the condemnation was hopeless, the claimant was not required to show that he had prosecuted an appeal. Seizures of munitions of war and provisions, and levies of pecuniary contributions in neutral territory by national functionaries for public uses, were treated as grounds for indemnity. Also the burning of American vessels at sea by a French squadron to conceal its course from the enemy. Spoiliations of a minor sort, having the character of personal depredations, were excluded.<sup>1</sup> But, apart from spoiliations in which the agency of the French Government through its own officers was in question, there was a large class of cases in which it was alleged that France influenced or compelled other nations to commit wrongs. This allegation especially affected claims growing out of spoiliations in Holland and Denmark.

When the convention between the United States and France of 1831 was concluded more than a year had elapsed since Wheaton brought to a successful termination his negotiations with Denmark for the payment of the claims of American citizens on account of the seizure, detention, condemnation, and confiscation of their vessels, cargoes, or other property in that country. If Denmark was thus liable, was not Holland also? If so, the claims against Holland were not valid charges on the fund under the convention with France. In reality, the United States had practically abandoned the claims against Holland, claims which grew out of the seizure and the sequestration or confiscation of American vessels in Dutch ports in 1809 and 1810. When the United States pressed the claims in 1815, the Dutch Government denied its responsibility on the ground that when the seizures occurred the Netherlands were under the actual government of France. The discussion continued from time to time for five years. The cases of three vessels were particularly discussed: *The Baltimore*, Captain Philips; the *Bacchus*, Captain Johnson; the *St. Michael*, Captain Dawson.<sup>2</sup> On May 26, 1820, John Quincy Adams, as Secretary of State, instructed Mr. A. H. Everett, the chargé d'affaires of the United States at The Hague, to forbear to press the matter further for the present. This step was taken at the request of the Dutch Government, made through its minister at Washington, that the claims be not further pressed.<sup>3</sup> The commissioners under the convention with France decided that these claims constituted valid demands against the French nation. Mr. Kane discussed the question as follows:

"1st. Holland, after some ten years of political changes, during which though nominally independent she was tributary to all the projects of France, had received in the month of June 1806, a king of the Napoleon family. But it was manifest, that in placing Louis upon the throne, his brother had not renounced his control over the affairs of that country. The form of distinct sovereignties was presented to the public eye; but the energies of the Dutch people were directed more than ever to the advancement of the imperial policy. At last, in the concluding month of 1809, a new crisis approached. At a moment when the finances of Holland were in a state of extreme embarrassment, she was required to destroy her commerce with foreign nations, which formed the principal source of her

<sup>1</sup> *U. S. v. Jones*, 3 Wash. C. C. 218; *Case of Cheline*, 2 L. G. 714, 754.

<sup>2</sup> *Am. State Papers*, For. Rel. V. 598-629.

<sup>3</sup> *Id.* 629.

revenues. Louis ventured to remonstrate, and delayed compliance with the mandate. He was reminded in reply, that the country of which he was sovereign was a French conquest, and that 'his highest and inexpressible duties were to the imperial crown;' and it was announced to him, in terms which could not be mistaken, that the project of uniting Holland to the empire was already matured, and that its consummation could only be postponed by his unqualified obedience. Among the most decided, though not the first tests of his submission, as he has since declared to the world, 'the pretended treaty of the 16th of March 1810, which was in fact a capitulation, was presented to him to be ratified.' 'It was imposed,' he adds, 'by the emperor;' and a prisoner as Louis was at the time at Paris, he had no choice but to yield. The French armies had forcibly possessed themselves beforehand of several of the Dutch fortresses; French officers of the customs occupied all the ports and outlets of the kingdom; and Napoleon, confounding apparently his purposes with their execution, had already directed his decrees to the authorities of Holland as if it was one of the departments of France. The assent of the king however did not avail to prolong his reign. The troops of his brother continued to advance, they menaced Amsterdam, the popular feeling was inflamed, and in the vain hope of averting a new revolution, Louis abdicated on the 1st of July in favour of his son. It was unnecessary: the emperor's arrangements were already made: a decree of thirteen articles was issued on the 9th from the palace of Rambouillet, the first of which declared that Holland was united to the empire.

"The tenth article of the treaty of 16th March 1810 was as follows: 'All merchandize, which has arrived in American vessels in the ports of Holland since the 1st of January 1809, shall be placed under sequestration, and shall belong to France, to be disposed of according to circumstances and to the political relations with the United States.' It was executed in the spirit which suggested it, rather than according to its terms: every American cargo, without reference to the date of its importation, was sequestered at once. Some were afterwards released under the decree of 9th July 1810, or by special favour; but the greater number, after more or less delay, were sold by the imperial order, and their proceeds passed into the *caisse d'amortissement* at Paris.

"It was for the value of these cargoes, that reclamations were made before the commissioners. The brief account which has been given of the political condition of Holland from the year 1809 till it was formally merged in the French empire, sufficiently explains the reason for allowing them. Holland was already a dependent kingdom, and Louis a merely nominal sovereign. The treaty was a form; in substance it was an imperial decree.

"2d. The spoliations to which Denmark ministered were of a different character. The grand project of Napoleon, which was to effect the subjugation of Great Britain by excluding her manufactures and the productions of her colonies from the markets of the world, had received the assent of nearly all European sovereigns. Denmark had been at war with England since the attack of Copenhagen in 1807, and had vied with France in edicts for the imprisonment of British subjects and the confiscation of their property. But, in the summer of 1810, she had not extended to her territories the prohibitions of the continental system. Large quantities of colonial produce belonging to American citizens were in consequence collected in the duchy of Holstein. The city of Hamburg formed the frontier post of the French custom houses; and its proximity to the free port of Altona, from which it is divided only by a geographical line, offered great facilities to the secret introduction of forbidden merchandize from the adjacent duchy.

"At this time, 10th August 1810, the decree of Trianon was promulgated, which marked the first change in the imperial policy by declaring a tariff on the productions of British colonies. This was followed on the 2d of October 1810 by a decree of Fontainebleau, applying the provisions of the former decree to all colonial produce found in the Hanseatic towns, or which might be imported into them thereafter. A third decree bore date the 4th of October: it recited that much colonial merchandize had been

brought into Holstein by Danish privateers, and authorized its introduction within the lines of French custom houses, by the way of Hamburg, at any time before the 1st of November following, on compliance with certain formalities and payment of the prescribed duties. No doubt these duties were enormous, prohibitory even; but in this there was nothing to complain of. So far as the decree of the 2d of October was retroactive, it affected those only who had been guilty of an offense against the regulations previously in force; and as to the future, it was optional with the owners of the goods, whether they would avail themselves of the privilege of bringing them to Hamburg on the terms proposed, or not. A series of ordinances of the king of Denmark succeeded however, which deprived them of this right of choice.

"The first of these was issued at Fredericsberg on the 20th of October. After announcing the qualified removal of the interdict on importations of certain goods into Hamburg by the French decree of the 2d, and conceding to those interested the royal permission to avail themselves of the privilege granted by 'the friendship' of the French emperor; it proceeds to declare the purpose of the king, to 'co-operate on his part in attaining the object of the emperor, by raising the prices in the duchies of wares named in the tariff to the height which they have reached in the neighbouring countries in which the French tariff is already established, and by preventing as far as possible the illicit exportation of colonial goods.' It then ordains, that everyone having in the duchies any such goods as are specified in the French tariff, shall declare the same within forty-eight hours on pain of confiscation, and shall within forty-eight hours more, make report of the quantity he intends exporting to Hamburg; it fixes the manner in which the transit shall take place, by the way of Altona, and enacts that goods once entered for transit shall not afterwards remain in the country; it charges a transit-duty of six per cent ad valorem on the goods so reported, in addition to that previously subsisting, and on the goods which shall not be reported it levies a heavier impost than that prescribed by the tariff of Trianon.

"Other ordinances followed on the 26th of the same month, avowedly at the request of the French emperor, and having for their object the expulsion of colonial produce from the Danish territories. At last it was announced, that by a royal decree of the 9th of November, 'all colonial goods held on foreign account in the duchies of Sleswig and Holstein, so far as they are referred to in the ordinance of the 20th of October, shall within twenty-four hours after the publication of the present decree be reported by the factors or other holders for exportation to Hamburg; and in default of such report, shall be confiscated.'

"Driven by force of these extraordinary enactments out of the Danish territory, the route designated, and all escape fully guarded against, the colonial merchandize passed into Hamburg, and there became subject to the tariff of Trianon. The only indulgence which could be obtained by the owners, was a permission to pay their duties in kind, by surrendering two-thirds of the goods to the French Government; the rest standing charged with the transit duties and other expenses, which generally more than consumed it.

"Such is the history of the claims, which were classed as the Holstein and Hamburg cases. They present, on the part of Denmark, a train of wrongs unworthy of a state unquestionably sovereign and professing to be free, committed against the citizens of a friendly nation, who had violated no law, and were entitled to protection by every title of hospitality and justice.

"But the question before the board regarded not Denmark, but France. One cannot be charged with the acts of the other; for neither was dependent. It may be, that the conduct of king Frederic was dictated by his anxiety to conciliate the favour of the French emperor; or perhaps he was moved by the portion of the spoil which might fall into his hands: we had nothing to do with his motives or his fears. The act was his own: the kingdom of Denmark was then, as now, independent.

"France might plead the systematic evasion of her commercial regulations at Hamburg, and the well-known illicit destination of some of the

merchandize which was stored in Holstein, to excuse the complacency with which she regarded the ordinances of the king: we cannot complain that she did not relax her tariff in favour of the reluctant importers from the Danish dominions

"This then is the broad distinction between the cases of Holland and Denmark. The former was a nominal, the latter an actual sovereignty. The intervention of one was merely formal, and was exacted by force; the other was the voluntary pander to French avidity."

If in any case it was decided that the act complained of was the act of France, the next question considered was whether the act constituted an unlawful seizure, capture, sequestration, confiscation, or destruction of property. Where property was condemned for violation of municipal regulations within municipal jurisdiction this question was answered in the negative. Articles VII. and VIII. of the Berlin decree, preventing the reception of vessels coming directly from British ports, and punishing fraudulent attempts to evade the prohibition, were treated as legal. The enforcement of the Trianon decree at Hamburg in 1810, as above detailed, was likewise held not to afford a ground of claim.

In one class of cases, involving the validity of certain alleged municipal regulations, the conclusion of the board was more definite than the reason by which Mr. Kane seeks to explain it. The class in question was that of vessels captured on a voyage to or from ports in St. Domingo (Hispaniola), under the French *arrêts* prohibiting trade with ports of the island occupied by the blacks. In some cases the vessels were regularly condemned, while in others the condemnation was irregular or altogether lacking; but in each case it was conceded that the vessel was on a voyage to or from a prohibited port, and, on the rule applied by the board, that irregularities in procedure would not avail a guilty claimant, it was considered that no indemnification could be allowed unless the *arrêts* were unlawful. In July 1800 the blacks, who had for some time been in revolt, declared their independence and established a constitution of government. "In the beginning of 1802," says Mr. Kane, "a French army attempted their subjugation, and from that time till the year 1806 the *arrêts* in question were published by the French captains-general of the island. The object of all of them was the same—the prohibition of commerce with the revolters, some declaring the island in a state of siege, while others subjected to capture and confiscation all foreign vessels found within a prescribed distance of the coast, or coming out of ports occupied by the rebels, or bound to those ports, whether cleared directly for them or having masked clearances. Shortly after this period the attention of France was diverted from the concerns of St. Domingo, but it was only in 1825 that she for the first time recognized the political independence of the island." The United States never recognized the government of the blacks, and Mr. Kane properly observes that "the question of independent or not is a question for governments, with which citizens have no right to intermeddle." From this premise he draws the conclusion that "the *arrêts* promulgated by the French authorities were not in themselves unlawful," and then declares:

"It is unnecessary to inquire further into their character. They may have blended municipal remedies with belligerent rights, or may have transcended the proper limits of both; but they certainly interdicted commerce with the blacks, and this interdiction our citizens were bound to



respect. If their property had been seized, condemned, confiscated, it was among the hazards of which they were not ignorant, and which the alternative of large profits stimulated them to encounter. France may have done wrong in arresting them: she may have arrogated a jurisdiction which did belong to her; and for this the United States might have held her answerable. She may have condemned them irregularly; but the citizen has lost nothing by the irregularity, and can have no claim to indemnity."

The indefiniteness of the foregoing statement, in which the lawfulness of the decrees is assumed without regard to whether they may have "transcended the proper limits" both of municipal remedies and belligerent rights, and in which condemnation under them is treated as at most an "irregularity," may be dispelled by stripping the explanation of everything but the sentence in which it is admitted that the United States "might have held" France "answerable," but did not. Municipal interdicts forbidding intercourse with ports in the possession of insurgents or belligerents, as a substitute for a blockade duly instituted and maintained, have generally been treated as invalid.<sup>1</sup> The claims against Spain, settled under the Florida treaty, were largely based on her attempts to enforce her laws, forbidding intercourse with her colonies, against commerce with Spanish-American ports which were in the possession of belligerents, and which she was unable effectively to blockade. But in the case of San Domingo the United States had seen fit not only to recognize the French *arrêts*, but to assist in enforcing them by forbidding intercourse between the United States and every part of the island not in the actual possession or Government of France.<sup>2</sup> Back of this fact the board evidently did not deem it proper to go.<sup>3</sup>

As to the various cases in which the seizure and destruction of American property was justified by the immediate bearing of the law of nations, Mr. Kane

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says:

"1st. Confiscations of property contraband of war anterior to the 31st of July 1809, when the treaty of 1800 expired by limitation, and the seizure and detention of vessels containing it, for the purpose of unloading them, were of course decided by reference to that treaty. Those of later date, when the treaty had expired, rested on a different footing; but

<sup>1</sup> Mr. Bayard, Sec. of State, to Mr. Becerra, April 24, 1885, For. Rel. 1885, p. 254.

<sup>2</sup> Act February 28, 1806, 2 Stats. at L. 351; act of February 24, 1807, 2 Stats. at L. 421.

<sup>3</sup> By some manuscript notes of Mr. Campbell, for which I am indebted to one of his descendants, I find that he did not concur to the full extent in the decision of the board in the St. Domingo cases, but read an opinion expressing his dissent on certain points. He admitted the validity of the *arrêts* as municipal regulations, but contended that as such they could have no effect beyond the territorial jurisdiction. A vessel which had traded with a prohibited port might, on coming out, be captured even on the high seas for the offense committed within the jurisdiction. Such he understood to be the rule of the law of nations as laid down in *Hudson v. Guestier*, 6 Cranch, 281-285. But he contended that vessels on the outward voyage from the United States, before they had come within the jurisdiction of St. Domingo, and therefore within the operation of the decrees, were not liable to capture.

the liberality of the French courts on the subject of contraband left little occasion to decide the difficult questions which belonged to it. In regard to provisions and supplies generally, the board adopted the rule of the British admiralty and of our own supreme court; and held them illicit, only when they were destined to the military or naval use of an enemy of France, and when they were not the productions of the United States.

"2d. One class only formed an apparent exception to the last part of this rule. During the siege of Cadiz by the French in 1810, 1811 and 1812, numerous cargoes of provisions of American origin were despatched from the United States for traffic with the besieged. The fact of the siege was of course well known to those engaged in these voyages, and formed indeed their principal incentive. A number of vessels with this destination and object were taken by French boats within the limits of the outer harbour of Cadiz, or so immediately in its vicinity as to preclude the excuse that they were ignorant of the continuance of the siege. They were condemned on the ground that they had sailed with an intention of violating the siege, and had thus made themselves allies of the enemy. No evidence appears to have been offered to the French courts, nor was any presented before the board, to show that this was not their original intention or that it had been abandoned. Their apparent and uncontradicted purpose therefore was to minister to the necessities of the besieged and fortify their resistance.

"The law has long been settled in England and our own country, that a vessel sailing for a blockaded port with knowledge of the blockade is liable to the consequences of a breach of it (1 Robins. 154; 4 Cra. 78; 5 Cra. 335; 6 Cra. 29) and neither in our treaties with foreign powers nor in the treatises of public jurists is there to be found a reason why a sailing with knowledge for a besieged port should not have a similar effect. It was asserted before the board that the investment of Cadiz by the French was only on the landside, and by analogy to some decisions of Sir William Scott in cases of blockade it was contended that a maritime expedition could not be an infraction of the siege. It might however be sufficient to reply, that the capture of so many vessels at the very opening of the port by boats armed for that purpose, was proof in itself that the investment had been more complete than was admitted by the argument. But the analogy on which the argument rests is imperfect. In the cases of the *Ocean* and the *Alert* (3 Rob. 297, 4 Rob. 65), which are those referred to, the question was, whether a voyage from an open port became a violation of blockade because the cargo had been brought overland from a blockaded town. Had the goods in those cases been captured before their arrival at the place of exportation by troops stationed by the way for the purpose of intercepting them, the facts would have more nearly resembled those, on which the board was called to decide. It is enough for the vindication of France, that the means which she employed for the investment of Cadiz were such as to make a breach of the investment 'evidently dangerous.' Whether she used ships of war to prevent the introduction of supplies, or whether she relied on her batteries or her boats to produce the same result, is altogether unimportant. Nor has a neutral the right to question the adequacy of the force to the object, if there appears to have been a real intention of seeking the reduction of the place by investment. How can he in such a case complain that the force was insufficient to occasion evident danger of capture, and that he was himself captured by that very force?

"3d. A still more plain dereliction of the neutral character was that of an engagement in the transport service of an enemy of France; as where an American vessel was chartered by a government agent to carry supplies to the British garrisons in the West Indies, and was captured while performing that office. The only difficulty, in cases like this, was in attaining a knowledge of the fact. It rarely presented itself in the evidence before the prize court, and did not perhaps form a part in every instance of the more full development of interests which was exacted by the rules and practice of the commissioners.

"4th. Under the treaty of 1800, the cargo took its national character from the flag under which it was carried; free ships making free goods

and enemy snipe enemy goods. But when that treaty expired, the general law of nations obtained as between France and the United States, according to which, the property of an enemy is under all circumstances a legitimate object of seizure and confiscation. Accordingly, when an American had laden his goods on board a British vessel, he could not complain that his voyage was broken up by the capture of the vessel; and for the same reason a British cargo would authorize the arrest and temporary detention of an American vessel. Still, according to the law of nations, the property of the neutral would not be affected in either of these cases by its association with that of a belligerent. The American cargo would be restored, and the American ship released as soon as she could be unladen. The exceptions to this rule were founded on the alleged misconduct of the neutral. If he endeavoured to mask the property of the enemy, by commingling it with his own or by otherwise investing it with a neutral garb, he was punished for the deception by a forfeiture of his national claim to immunity. Thus, where a Swedish ship which had been purchased by an American, entered a port under the dominion of France then at war with Sweden, and exhibited simulated American papers to protect herself from capture as an enemy, her cargo belonging to the same American was held justly liable to condemnation.

"5th. The absence of appropriate documents to establish the American character of a vessel or its cargo, constituted another sufficient ground for its arrest and detention. But it was held by the board that the deficiency was not *per se* a ground for condemnation. The seventeenth article of the treaty of 1800 provided that such cases should be examined by a proper tribunal, and that their neutrality might be sufficiently established 'by other proofs admissible by the usage of nations.' The absence of a similar provision in the treaty of 1778, connected with a stipulation that neutrals should in times of war be provided with certain national documents, had given room for a different decision by the French courts. But the commissioners were of opinion that, independent of the treaty of 1800, and of course after it had expired, secondary proofs of nationality could not be rejected in ordinary cases without violating the law of nations. The eleventh article of the French regulations of 26th July 1778, which ordained that 'regard should be had only to the documents found on board' at the time of capture, was regarded as itself an interpolation in the code of public law which no nation had authority to make. It was unnecessary to appeal on this point to the unvarying rules of other countries. The very words of the treaty of 1800 recognize that other proofs are 'admissible by the usage of nations,' and give to the treaty provision a merely declarative character. Whatever may have been at one time contended in the United States, the principle is too clear for argument now, that a nation cannot modify her expressed compacts nor those which are implied by the general usage, without the assent of the parties by whose concurrence they were originally established.

"The Berlin decree was held by the commissioners to present no justification for the acts of France, so far. 1. As it interdicted to Americans the trade with England in goods not contraband and to ports not actually blockaded; 2. As it interdicted to them the trade in English manufactured goods; 3. As it condemned American ships for carrying British property; and 4. As it condemned American property, because found on board British vessels, or having been under the protection of British convoy.

7th. There was one class of cases within the operation of the Milan decree which was held to furnish no ground of complaint. It was that of captures made by France of American vessels while in the possession of English captors, after a forcible detention of more than twenty-four hours. It is indeed somewhat doubtful whether the French law of recaptures was at all changed by the decree. According to long established regulations, a French vessel after twenty-four hours' possession by an enemy becomes absolutely the property of a French recaptor, and is not restored on salvage. The same rule has always been applied to the property of allies of

France, when recaptured from her enemy. But as to neutrals; from the year 1779 the usage for many years was to restore recaptured neutral vessels, provided they were not laden with contraband, or otherwise in circumstances to incur the hazard of confiscation (*dans le cas d' être confisqué*) by the enemy.

"It was perhaps, because this hazard was supposed to attach to all neutrals when captured under the earlier orders in council of Great Britain, that the council of prizes at first, in the early part of the present century, pronounced the condemnation of recaptured vessels, with innocent cargoes. Such was the case of the *George, Eveleth*, captured by the British in January 1808, recaptured by a French privateer in February, and condemned in July following, on the express ground of the recapture, as well as for a breach of the Milan decree. But as all such cases were covered by the language of that decree, the idea of a 'visit from a British cruiser' being included in that of capture by such a cruiser, the French courts, after the decree had been promulgated, generally referred to it as their authority for pronouncing condemnation.

"It is not necessary to seek through the various and conflicting usages of different nations for a general law on the subject of recaptures, nor to inquire whether the Milan decree, in this application of its provisions, violated the rights of neutrals. Under what circumstances the recapturing cruiser is bound to investigate the title by which his enemy held possession of the prize, and how far the principles differ under which an eighth, a third, the half, or the whole of the neutral's property is condemned without reference to any act of his, might at one time have been topics of difficulty as well as interest. But the act of Congress 'providing for salvage in cases of recapture' (1800, ch. 14, sec. 3), and which our highest court has applied to cases of neutral and belligerent property alike, has decided the only question which could properly claim the notice of the commissioners. This act provides that property belonging to subjects of a foreign state shall, when recaptured by vessels bearing American commissions, be either restored or condemned, on the same terms and by the same rule as would be applied by that foreign state to American property in similar circumstances. Thus adopting the principle of reciprocity, we have admitted the right of other nations to legislate on the subject as they see fit, and cannot complain of the manner in which the discretion is exercised. Whatever may be their law, it is for the time our own: we deal with their citizens as they deal with ours. It is unnecessary therefore, to inquire whether the French law of recaptures is of ancient standing, or a consequence of the Milan decree, nor whether it is essentially reasonable or just: our inquiries are at an end, when we have ascertained what it is. No reclamation can be founded upon its application to the case of an American citizen."

Assuming that an unlawful act on the part of France was established, was it injurious to the claimant, and was the injury susceptible of pecuniary reparation? The board did not deem it necessary, says Mr. Kane, to distinguish between cases in which the act of France constituted the essential wrong, and those in which the injury was plainly and immediately consequential, as where a vessel unlawfully captured was wrecked in the hands of the captors, or damaged or vexatiously detained. So, in the peculiar circumstances before the board, under which capture was almost equivalent to condemnation, salvage was allowed for the recapture of neutral property.<sup>1</sup> On the same principles, claims were allowed for ransoms paid to avert confiscation. Usually, however, it was requisite to show that the injury was directly referable to France. It was also necessary to show that the wrong was not of form, merely, but of substance. Irregularities in procedure, where no injustice was done, were not regarded.

<sup>1</sup> *The War Onskan*, 2 Rob. 299; *The Sansom*, 6 Rob. 410; *Talbot v. Seaman*, 1 Cranch, 37.

**Claims Renounced.** As to the acts by which the rights of an American citizen to indemnity might be invalidated, Mr. Kane discussed, first, the acts of the United States, and next the acts of the citizen himself. The most important act of the United States in this relation was the renunciation of claims by the convention concluded September 30, 1800. Mr. Kane, speaking for himself both as to "fact" and as to "argument," says that "in general," indemnities "due or claimed" before July 31, 1801, the date of the exchange of the ratifications of the convention at Paris, were understood to have been renounced, on the ground that "a treaty has effect from the date of its final ratification," and therefore that the claims which were released were those that existed at that date. The obvious consequence of the assumption that the convention was to be considered as having taken effect, in respect of its renunciations, at the date of its ratification and not of its conclusion, was to invalidate a number of claims. From the exclusion of claims that arose prior to the date of ratification, an exception was made in respect of property which France was obliged by Article IV. of the convention of 1800 either to restore or to pay for, but which was not provided for by the convention of 1803. Where restoration had become impossible, as by recapture, France was not held liable.

In considering the claims under Article IV. of the convention of 1800, the question arose as to whether it was necessary that the claimant should have demanded restitution of or compensation for his property from the French Government, supported by the proofs of ownership which that article prescribed—a passport and a certificate of cargo. On this question the board granted a rehearing, but adhered to its decision that the proofs of ownership prescribed by the article were essential to substantiate the claim. The passport and certificate of cargo prescribed by the convention of 1800 were the same as those specified in the treaty of amity and commerce of 1778, and the board held them to be exclusive proofs of ownership. This question, it may be observed, was distinct from that of the condemnations for want of a *rôle d'équipage*.

**Case of Insurers.** The principal cases in which claims were held to have been invalidated by the claimants themselves were those in which there was an omission to seek the relief provided by the convention of 1800, either by failure to bring the case before the proper tribunal or to produce the necessary proofs, or in which the claimant had accepted an indemnity, though an insufficient one, from France; or, most numerous of all, in which the loss was borne by insurers. In the last case the insurer was treated as having acquired *pro tanto* an interest in the fund;<sup>1</sup> but if he happened to be a foreigner he was held to be excluded by alienage, and his payment for the loss operated as "an absolute relief to the fund."

<sup>1</sup> "Special agreements, however," says Mr. Kane, "distributed the interests in some cases differently. An insurer sometimes became invested by contract, like another purchaser, with the whole claim of his assured, and sometimes the claim to indemnity was under a compromise surrendered by the insurer. But even in these cases the principle underwent no modification. The rights under the treaty were still held to have vested in the party who was substantially injured by the act of France; and if either

In restricting awards to the loss actually sustained  
**Measure of Damages.** by claimants, without interest, Mr. Kane, though he seeks to justify the rule in point of law, substantially admits that the action of the board was influenced by the disproportion of the fund to the amount of the claims. The rules actually applied by the board in determining the amounts to be awarded are explained by Mr. Kane as follows:

"1. In the ordinary cases of seizure and confiscation, the loss to the American citizen consisted in the value of his property at the time it was unlawfully taken from him, and the expenses which he incurred in a reasonable effort to defend or reclaim it.

"1. Where the property was seized on shore, at the place to which it was destined, and where it had a defined marketable price, that was adopted as the criterion of its value. It was ascertained by reference to prices current and letters of the day, or accounts of sales effected before the seizure. Evidence such as this formed by much the most satisfactory basis for the awards of the board.

"The sales which took place under the authority of the French Government, whether before or after the final confiscation, were rejected from consideration. They were substantially prize sales, and their prices were influenced by causes, with which the value of the property while in the hands of the owner had no connexion. Sometimes the nature of the cargo seized was such, that its introduction into the market by ordinary commerce was absolutely prohibited. The exclusion from Europe of the productions of British colonies was the great purpose of the continental system of Napoleon, and formed the excuse for some of the heaviest seizures of American property. But, once sold as prize, colonial produce was admitted for consumption wherever that system prevailed. It is obvious that the price in these cases was enhanced by the privilege which the government sale conferred. In every instance a custom-house seizure of neutral property, by proclaiming the hazards to which its importation was exposed, and so deterring others from the perils of competition, exaggerated the price for which it sold. Sometimes, on the other hand, the sale was made in a remote, a glutted, or an otherwise inappropriate market; and the proceeds fell short of the cost. The loss to the American citizen by the confiscation of his property, and the receipts into the French Treasury from the sale of it, were therefore affected by circumstances altogether different, and could approach each other only by accident.

"2. Where the property of an American citizen was seized on the ocean, a different method of ascertaining its value was necessarily resorted to. Recourse was had in such cases to its last known value and to the circumstances which had afterwards increased or impaired it.

"The vessel was generally estimated at her cost to the owner, deducting a reasonable percentage for her subsequent depreciation. The expense of constructing her, as entered in the builder's books of account, and the price paid for her by the claimant, or that for which an interest in her had been sold to others, were of course safe guides to her value at a certain time. The valuation sometimes found in the charter parties, and that stipulated in policies of insurance or embargo bonds, were also valuable, though rarely to be accepted as conclusive; and even modern depositions were sometimes resorted to.

the insurer or his assured obtained an award for more than he had lost it was only as assignee for the other's interest. The *spes recuperandi* was not held to be the indispensable companion of a valid reclamation. The former passes by cession, and only as a consequence of abandonment; the latter was recognized wherever a loss had been paid, whether partial or total. In the case before the supreme court of New York (8 Johns, 237) the insurer received neither abandonment nor cession, but he had the title to indemnity; the *spes recuperandi* did not pass to him, but he acquired the right of reclamation."

"These proofs of value however were rarely full, and sometimes all of them were wanting. Aware that this might probably be the case, the board at an early day invited the gentlemen who represented claims before them, to aid them in collecting information as to the cost of constructing vessels of different classes, in the several building districts of the United States, during the periods embraced in its investigations, and to ascertain from the insurance offices and other proper sources the rate at which such vessels depreciated as they grew older. Several gentlemen were kind enough to take upon themselves portions of this labour. My deceased friend, Alexander Stewart, Jun., of Philadelphia, whose name will recall to the circle which knew him all that is indefatigable, accurate, and just in mercantile character, devoted to it the industry of several months; examining the books of builder's, merchants and insurers, where these were accessible to him; gathering facts and estimates from intelligent residents of other cities by correspondence; collating his materials, and presenting their results in a tabular form.

"The seizure and description of the vessel, its place of construction, and its age were except in a few cases of foreign built vessels determined easily by the register; and the proximate, or rather the probable value was then fixed by reference to the general table of information which had been collected on the subject. This result was compared with the proofs in each case; and the table was made more accurate for future use by the repeated tests which were thus applied to it.

"The cargo when taken at sea was estimated at its price in the market from which it came, and the different charges which had contributed to increase its value. The bills of parcels of the claimants, their invoices—taking care to strike out the debentures on foreign merchandize where they appeared to be included in the price—the sworn value in the manifests of exportation, and a comparison of these in some cases with other similar documents relating to other shipments, or with prices current of the day, enabled the board to fix the original cost with reasonable certainty.

"To this were added the ordinary brokerage on the purchase of the goods—whether it was actually paid by the claimant, or the transaction was effected by his personal agency—the expenses of shipment, and the fair and ordinary premium of insurance for the immediate voyage, ascertained at the time of shipment and calculated to cover. This premium was regarded as a sufficiently exact equivalent for the hazards of the voyage, and as indicating definitely the increase of value which was gained by encountering them. It was therefore allowed, without inquiring whether the risk had been transferred by contract to an insurer, or was borne by the owner himself.

"As the vessel was the subject of specific allowance, and wages are not due unless the voyage be completed; and as freight is made up only of these and of the profit of the ship owner on the capital invested in his ship; it would seem at first view that the rule which excludes a claim for prospective profits should also apply to one for freight. But, as the premium of insurance represents the increase of value which is communicated to goods by the hazards they have encountered, so freight or the cost of carrying them indicates the increase of value they derive from their change of place. There is only this difference between the two: that the right to the full premium is fixed from the commencement of the risk, while the freight is not finally earned till the cargo arrives at the port of delivery. Both contribute to the value of the goods at the time of capture, the premium having imparted its entire amount, as a charge incurred at the time of shipment; the freight imparting such a share of its stipulated amount as is proportioned to the part of the voyage performed, *pro rata itineris peracti*.

"In estimating the *pro rata* freight, the board was guided by the practice which obtains in most of our commercial cities in the adjustment of average losses, and fixed it at two-thirds of the full freight on the immediate voyage.

"Yet, though the freight was allowed only as an element in the value of goods, it was not always or even generally awarded to the owner of them.

The question remained as in all other cases to be settled by facts: Was he the party substantially aggrieved? If he had paid the freight, as was sometimes the case under special contracts, he received it back under the treaty; if he had not, the award was made in favour of the ship owner, as the real loser.

"3. Other cases presented themselves in still different aspects. Sometimes the seizure took place while the vessel was in the act of entering her port of destination; sometimes after she had arrived there, but before the cargo was unladen; sometimes after a partial delivery. The question, in what manner the property should be estimated in these cases; whether according to the market value abroad, or the cost at home with the charges of shipment and freight; was often embarrassing from the difficulty of distinguishing in principle between them. Vessels in the same trade were taken possession of under the same pretext, often in sight of one another, when the forbearance of a few hours would have made their circumstances identical.

"The distinction which was adopted divided them into two classes, depending on the fact of the voyage being legally completed, or otherwise: and as according to the mercantile law full freight is earned only when the voyage is complete, the rules established by the courts on the subject of freights determined for the board its mode of estimating the value of these cargoes. Thus it was held, that the domestic value must be the basis of estimation in all cases where the vessel had not actually entered the port before capture: but where she had entered it, and was prevented from delivering her cargo by the act of the French Government, the voyage was held to be complete, freight earned, and the value of property abroad became the measure of the award. (See the case of *Morgan v. The Insurance Company of North America*, 4 Dall. 455.)

"4. A small class of cases remained to which neither of these rules of estimation would apply. They were those in which the cargo was acquired principally by the skill, enterprise and labour of the claimants, and the application of moneyed capital had contributed very little to its value. Such were the cases of vessels engaged in the fisheries, or in whaling or sealing voyages. In these, for want of a rule of more probable accuracy, the cargoes on board at the time of capture were valued at the prices which they would have realized in the markets to which they were destined.

"To each of the awards which have been described was added a reasonable but guarded allowance for the expenses attending a reclamation immediately after the capture, where it was shown that they had been paid by the claimant. These were a proper consequence of the wrongful act of France; and indeed it would generally have formed a just objection to any claim against her, that it had not been prosecuted at the time when it arose.

"II. The only awards that are not explained by the preceding remarks, belong to cases where the property seized was not finally confiscated, or where a portion of its proceeds was restored to the owner.

"1. We have intimated already, that where a vessel was conducted into a port as prize to a French cruiser, a reasonable detention for the purpose of determining her character formed no ground of complaint against the nation. This is obviously true, if the arrest was justified by circumstances of suspicion; and even if it was plainly tortious, it was the act of individual wrong doers only, until it received the sanction of the government.

"2. Where the release justly claimable was vexatiously withheld, compensation was awarded to the ship owner for the wages of his crew, for the expenses of supporting them, and for the damage incurred by the vessel during detention. If however a condemnation supervened, the items of wages and damage were omitted in the calculation: wages, because in such case they were not payable; and damage to the vessel, because it was merged in the general allowance of her value at the time of capture. This class of awards was generally described as the allowance for demurrage; but the loss of interest on the capital invested in the ship, which forms the most important element in the charge commonly known by that



name, was not recognized as a subject of claim before the board. In fact, as soon as it was determined, for reasons which have been stated, that interest was not to form a substantive part of the award in each case, it became necessary to reject it from the elementary computations. But for this, the interest accruing on the cost of a cargo would have entered into the estimate of its value when captured at sea.

"In like manner an allowance was made to the owner of the cargo for the damage it sustained by an unwarrantable delay of restoration.

"3. Where the property was recaptured from the French and restored to the owner on payment of a salvage, the amount so paid was plainly the measure of the owner's damages.

"4. So, too, where the property was ransomed from the captors, the owner's loss was the price which he paid for the ransom. This of course supposes that there had been no change of its value in the intervening time: if it was injured while in the captor's possession, or if on the other hand it became more valuable in consequence of some act of theirs, the circumstance as it affected the amount of loss to the claimant, was regarded in the formation of the award.

"5. This was indeed the spirit of the distinction between the two classes of ransoms and compromises. In the former, the property was restored soon after the seizure, and before its value was materially altered. The latter were contracts, entered into after the property had been brought into port, and to be carried into effect after a judicial proceeding or by means of one. The part restored was to be invested with the character of prize goods, and to be sold under the sentence of a court in the market to which it had been carried by the captors; or else, the whole was to be sold together as prize, and the contract was for the restitution of a share of the proceeds.

"The effect of this was sometimes to diminish, but generally to augment greatly the value of the property. It happened not infrequently, that the claimant, who had relinquished to the captors a third or even a half of his property, found himself much more than indemnified by the immense profits which a prize sale in a prohibited market enabled him to realize on the rest. The board, as we have seen, found itself obliged to disregard the result of prize sales in other cases; and there was no reason for a distinction in favour of these. The only fair course was to calculate the indemnity as in an ordinary case of confiscation, and to deduct from this the sums received by the claimant under the compromise: the balance, if any, was the amount to be awarded.

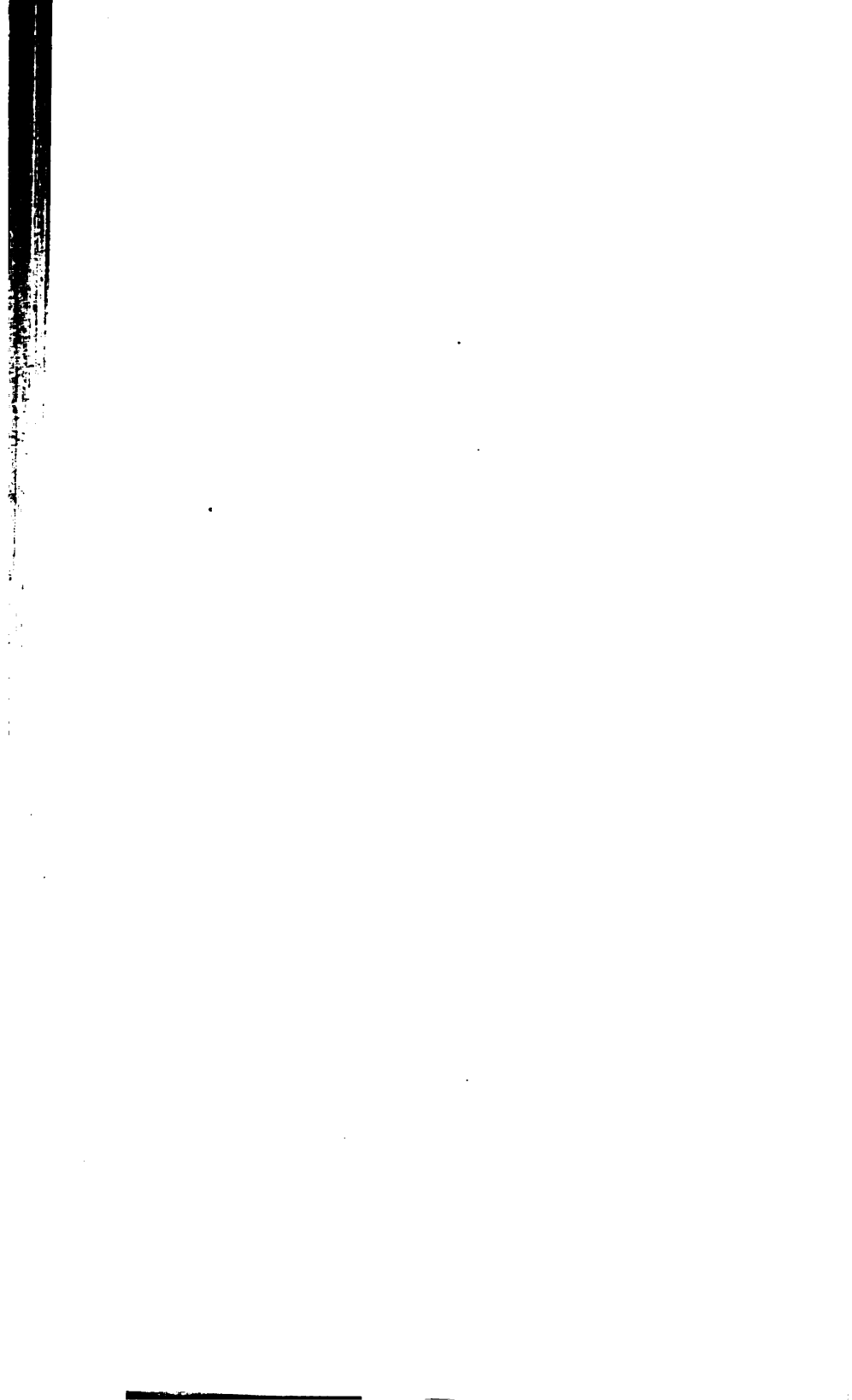
"6. In a considerable number of cases, the captured property was restored to the claimant, on his giving bond in a sum equal to its estimated value to abide the event of proceedings before the courts of prize. Such a transaction however had no effect upon the award of the commissioners. The wrong to the party was still the original capture: the bargain expressed in his bond was voluntary on his part, and was in fact nothing else than a conditional purchase, to become absolute in the event of a condemnation. Whether in the result this contract enabled him to make a profit, or whether it only served to increase his loss, the only injury which he could complain of against France was the capture and condemnation of his property.

"To the awards in these cases also, were added the reasonable expenses of the reclamations before the French courts."<sup>1</sup>

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<sup>1</sup>It appears that John H. Wheeler, of Murfreesboro, North Carolina, was in the first instance appointed clerk to the board whose history has just been narrated. (Mr. Brent to Mr. Wheeler, July 19, 1832, MS. Dom. Let. XXV. 138.)

In the *Reminiscences* of James A. Hamilton there is a letter from Mr. Rives, dated March 24, 1831, during the negotiation of the convention, suggesting that a number of the leading claimants should say what sum would in their opinion be admissible as a minimum. (*Reminiscences*, 201. See, also, pp. 238-240.)



## CHAPTER C.

### INDEMNITY UNDER THE FLORIDA TREATY.

#### War Between Spain and Great Britain.

It has been seen that the jurisdiction of the commission under Article XXI. of the treaty of 1795 between the United States and Spain was limited to losses occurring during what was called "the late war between Spain and France." Peace between those powers having been made in 1795, war broke out between Spain and Great Britain in the following year.

#### Pickering's Report on Depredations.

On the 21st of June 1797 Mr. Pickering, who was then Secretary of State, laid before the President a report concerning depredations on the commerce of the United States by the armed vessels of Spain, Great Britain, and France since the 1st of October 1796. In this report only one case of capture under color of authority of Spain was particularly cited; but it was stated that there had "probably been a number of captures by Spanish cruisers, although not particularly specified, the consul of the United States in one of the ports of Spain having informed that almost daily American vessels were taken and brought in by French and Spanish privateers."<sup>1</sup>

#### Madison's Report.

On the 20th of April 1802 President Jefferson, in response to a resolution of the House of Representatives, communicated to that body a report of Mr. Madison, as Secretary of State, containing further information in regard to Spanish spoliations.<sup>2</sup> By this report the spoliations since October 1, 1796, appeared to fall into six classes:

1. Vessels taken at sea and brought into Spanish ports by the French.
2. Vessels similarly treated by the Spaniards.
3. Vessels seized in Spanish territory, and either condemned there or sent to French ports by the French.
4. Vessels seized or detained by the Spaniards in Spanish ports.
5. Cargoes, belonging to citizens of the United States, seized or embargoed by the Spaniards on American vessels.
6. Cargoes, belonging to citizens of the United States, seized by the Spaniards on foreign vessels other than American.

By far the greatest number of complaints were said to fall within the first and third classes, comprising captures and condemnations by the French.<sup>3</sup>

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<sup>1</sup> Am. State Papers, For. Rel. II. 28.

<sup>2</sup> Id. 440.

<sup>3</sup> Id. 445-458.

When Charles Pinckney was sent as minister to *Pinckney's Instructions*. Spain in June 1801, he was "instructed to urge particularly on the Spanish Government redress for such of our citizens as have suffered from captures made by privateers unlawfully cruising out of Spanish ports, and from wrongful condemnations, both by Spanish tribunals and by decisions of French consuls, within Spanish jurisdiction." He was forewarned that the Spanish Government meant "to turn us over for redress to the French republic in all cases where the prizes have been taken under French commissions or been condemned by French consuls;" and was directed to "combat such an idea" with arguments drawn from sources in his possession, and with appeals "to the principles and motives which ought to direct the conduct of a wise and just government." For the purpose of adjusting the questions at issue, he was instructed to propose arbitration by a board of commissioners such as that under Article XXI. of the treaty between the United States and Spain of 1795, or those under Articles VI. and VII. of the Jay Treaty.<sup>1</sup>

Many of the attacks on the commerce of the United States that were begun or consummated in Spanish jurisdiction by persons acting under the authority of France occurred during the "misunderstanding" between the United States and the French republic which was terminated by the convention of September 30, 1800. Numerous seizures were, however, made by the Spaniards during 1800 and 1801 under a proclamation issued on the 15th of February 1800, on which day the Spanish minister of state announced that the King, in consequence of the "scandalous traffic" which many of his subjects carried on with Gibraltar in neutral vessels, and for the purpose of making reprisals against the enemies of his Crown, had declared the ports of Cadiz and St. Lucar de Barrameda to be blockaded, and had also thought proper to declare that from that day Gibraltar should be considered as blockaded, and that all neutral vessels going thither should be held to be legitimate prize.<sup>2</sup> While Gibraltar was little resorted to for the purposes of trade, American vessels engaged in commerce with the Mediterranean were very generally instructed to touch there, since in consequence of its situation it was much used by vessels as a port of call, not only for the purpose of getting information, but also for the purpose of obtaining the convoy of national ships against the Barbary corsairs. The blockade in question, at the time when it was proclaimed, was protested against by the ministers of the neutral powers at Madrid on the ground that it was not warranted by the real state of Gibraltar. It was subsequently stated that the force by which the blockade was alleged to be maintained was stationed at Algeciras, and was for the most part kept at a distance from Gibraltar by a superior naval force which it could not without manifest danger venture to approach; that, after the issuance of the proclamation, the port of Algeciras was itself entered and attacked by a British fleet, and that since this occurrence no proclamation had been made declaring the blockade to be renewed.<sup>1</sup>

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<sup>1</sup> Am. State Papers, For. Rel. II. 476.

<sup>2</sup> Id. III. 293.

Subjects to be Arbitrated.

While the twenty-first article of the treaty with Spain of 1795 was referred to as a model, it was pointed out to Mr. Pinckney that its provisions were in some respects incommensurate with the relief now sought to be obtained. They related solely to vessels and cargoes which had been taken (*apresado*) by Spanish subjects during the period covered by that treaty. The new complaints comprehended not only captures or condemnations by the French in violation of Spanish neutrality, but also claims for the attachment of property under fiscal regulations, for unjust criminal prosecutions, for the seizure of property in port on suspicion of being enemy's property, and for losses suffered by American citizens under tender laws by which they were required to accept payment "in a depreciated medium for specie contracts." Mr. Pinckney was therefore instructed to propose an article that would include all claims for losses sustained by the citizens of the United States, since the exchange of the ratifications of the treaty of 1795, "from the unjust seizure or detention of their persons, vessels, and effects, or otherwise, under color of authority from His Catholic Majesty," with such reasonable exceptions as the Spanish Government might desire to make. But in case that government should oppose any general provision, he was authorized, after securing a reference to commissioners mutually chosen of as many cardinal subjects as possible, to agree to submit the remainder to two or three Spanish officials, to be named in the agreement, whose award should not be final unless the claimant should within a given time signify his assent to it. "In this way," said Mr. Madison, "was settled a considerable number of our smaller claims on Great Britain for illegal captures, the King's advocate-general and doctor of civil law making the awards, which were generally satisfactory, and it is believed always accepted."<sup>1</sup>

Pinckney's First Proposal.

Mr. Pinckney prepared a draft of a convention in conformity with his instructions and submitted it to the Spanish minister of state. It included claims not only for spoliations by Spanish subjects, but also for spoliations that were effected or consummated within the Spanish jurisdiction by citizens of France. In answer to objections made to the inclusion of claims of the latter class, Mr. Pinckney argued that the permission to French citizens "to arm and equip their privateers in Spanish ports, and condemn and sell the vessels they had taken under the authority of French consulates exercising the powers of courts of admiralty," rendered the Spanish Government responsible for the losses so occasioned to innocent and neutral traders; that when, at the commencement of the war between England and France a similar use was made of American ports, the United States interfered to prevent it, and agreed to make compensation for vessels and cargoes that were brought in and condemned; and that, having pursued this policy toward other nations, the United States had a right to expect the observance of a similar conduct toward themselves.

The Spanish minister of state replied "that certainly Objections of Spain. it was very honorable and generous in the American Government to do this; but he did not conceive they were bound to do it by the laws of nations, or agreeably to the dictates of

<sup>1</sup> Am. State Papers, For. Rel. II. 478.



## THE FLORIDA TREATY.

States might have a right to compensation, the claims arising from acts of the French might prove to be less than those arising from excesses of Spanish subjects.<sup>1</sup> In a subsequent dispatch Mr. Pinckney referring to the reluctance of the Spanish Government to arbitrate the spoliation by the French, said: "They (the Spaniards) complain one of the hardest cases that can possibly occur; that their situation is well known; just emerging from a war with France, in which they were pressed to the last extremities; obliged to suffer the French Government to do as they pleased in their ports, for fear of renewing war by refusing and irritating them; to be thus mortified by these violations of their territorial sovereignty by a power they could not resist to be obliged, after all, to pay for those prizes, not one shilling of which even went into the pockets of the King or his subjects, appeared to be, as they have often said, one of the hardest cases that could be presented to them. Mr. Cevallos or the government here do not confess this to be the most unjust, but they say the laws of nations would not suffer them to avow it. They say the laws of nations or the treaty do not oblige them; but the true reason, I believe, I stated above."

**Postponement of Action by the Senate.** Mr. Pinckney's convention was laid before the Senate of the United States on the 11th of January 1803, when the session closed in March no final action was taken. It was found that while a majority was willing to accede in its ratification, the two-thirds required by the Constitution could not be obtained; and the consideration of the convention was postponed till the next session in order that another effort might be made to secure the inclusion of the claims growing out of the acts of the French.<sup>2</sup>

**Further Negotiations.** When Mr. Pinckney again brought forward the claims, the Spanish Government, while still denying that they were well founded in international law, set up in answer to them the convention between the United States and France of September 30, 1800. By the second article of this convention the claims of France against the United States growing out of the treaty of 1778, and the claims of the United States against France growing out of the spoliation of American vessels and cargoes by persons acting in the French commissions, were mutually postponed, and in the exchange the ratifications they were mutually renounced. It was maintained by the Spanish Government that if any obligation had rested on Spain in respect of spoliation by the French, she was absolved from it by the renunciation of the claims against France. The obligation of Spain in respect of such spoliation could not, said Señor Cevallos, have been more than a secondary or conditional obligation of suretyship, which is discharged by the discharge of the principal debtor. This being so, it was held that the United States in renouncing their claims against France as principal debtor, had released Spain from any liability for the acts

<sup>1</sup> The increase here indicated in the proportion of the Spanish claims and condemnations was mainly due to the adjustment of the claims between the United States and France by the convention of September 30, 1800, and the operation of the Spanish decrees of blockade of 1801.

<sup>2</sup> August 30, 1802. Am. State Papers, For. Rel. II. 483.

<sup>3</sup> Am. State Papers, For. Rel. II. 596.

French. In support of this position Señor Cevallos adduced an opinion given by certain eminent American lawyers adverse to the liability of a government for acts of hostility committed within its jurisdiction by the agents of a friendly power against foreigners, such government being unable to prevent the acts in question. In answer to this argument Mr. Pinckney maintained (1) that, in respect of the acts of the French for which it was sought to hold Spain liable, Spain and not France was the principal debtor; (2) that the renunciation under the convention between the United States and France of 1800 extended only to spoiliations for which France and not Spain was primarily liable; and (3) that, in supposing that the government within whose jurisdiction the hostile acts were committed was unable to prevent them, the question submitted to the American lawyers assumed that Spain was unable to prevent the acts complained of, an assumption which was yet to be proved.<sup>1</sup>

When Congress reassembled the President communicated these discussions to the Senate, in order that it might judge whether they offered such a prospect of obtaining the arbitration of the French seizures and condemnations as would justify a longer suspension of the claims for which Spain conceded her obligation to make indemnity.<sup>2</sup> Under the circumstances the Senate took up the convention and ratified it, and it was returned to Pinckney with instructions to exchange the ratifications.<sup>3</sup>

But in the mean time the cession of Louisiana by France to the United States had completely altered the relations between the latter country and Spain. Apart from the fact that the cession was highly repugnant to Spanish feelings, a controversy immediately arose as to the eastern limits of the territory. On the strength of Livingston's statement that the cession included West Florida, the United States claimed to the river Perdido, while Spain denied their right to any territory eastward of the Iberville.<sup>4</sup> In consequence of this dispute Spain declined to exchange the ratifications of the convention of 1802, and Monroe was sent to Madrid on a special mission to endeavor to settle, jointly with Pinckney, the question both of limits and of indemnities. Spain was, however, practically forbidden by France to grant any redress for acts of spoliation by French subjects, and she was sustained in her position respecting the eastern boundaries of Louisiana by Talleyrand's explicit declaration that the territory lying to the eastward of the Mississippi and the Iberville and south of the thirty-second degree of north latitude belonged to Florida, and was not included in the cession

<sup>1</sup> Am. State Papers, For. Rel. II, 596-606.

<sup>2</sup> In this relation the President suggested that as the settlement of the boundaries of Louisiana would require a new negotiation with Spain, the claims not embraced in the Pinckney convention might be included in those discussions. An instruction to Pinckney of February 6, 1804, declares that the suggestion that France was appealed to for redress in respect of those claims was unfounded. (Am. State Papers, For. Rel. VI. 185.)

<sup>3</sup> Am. State Papers, For. Rel. II. 615.

<sup>4</sup> Id. 613.



to the United States.<sup>1</sup> The United States and Spain also differed as to the western limits of Louisiana, the former claiming to the Rio Bravo, and a complaint had arisen as to Article XXII. of the treaty between the United States and Spain of 1795. By that article the King of Spain granted to the citizens of the United States, for the space of three years, a right to deposit their merchandise and effects at New Orleans and export them thence without payment of duty, and if at the expiration of that period the permission was found not to have been prejudicial to the interests of Spain he promised to continue it, or else to assign another place on the Mississippi for an equivalent establishment. The privilege of deposit at New Orleans was permitted to continue till October 16, 1802, when the Spanish intendente of Louisiana declared it to be suspended.<sup>2</sup> In the following April it was restored by order of the King of Spain,<sup>3</sup> but the United States had presented certain claims for losses alleged to have been occasioned by its suspension.

**Suspension of Diplomatic Relations.** After a long discussion in which Monroe and Pinckney urged the claims of the United States in respect of spoiliations, the suspension of the deposit at New Orleans, and the limits of Louisiana, and proposed a treaty for the cession by Spain of the Floridas and part of Texas, and for the establishment of a commission for the adjustment of the spoliation and New Orleans claims, they presented on May 12, 1805, the ultimate conditions on which they were authorized to adjust the several points in dispute. If Spain would cede the Floridas, carry into effect the convention of 1802, and accept the Colorado as the boundary of Texas, the United States would establish a district of thirty leagues on the American side of the Colorado, to remain neutral and unsettled; would assume the claims for spoiliations committed by the French within the jurisdiction of Spain; and would relinquish all claim to compensation for the suspension of the right of deposit at New Orleans. On the 15th of May Cevallos rejected this proposition, on the ground that the things that were represented as concessions on the part of the United States were in reality nothing but admissions that the pretensions of the latter government were unfounded. On the 18th of May Monroe asked for his passports, which were immediately granted.<sup>4</sup> A few months later Pinckney retired. He was succeeded by George W. Erving, with the rank of *chargé d'affaires*. In 1808 diplomatic relations between the two countries were broken off.

After the renewal of the war in Europe, on the termination of the Peace of Amiens, Spain, falling more and more into the power of Napoleon, was forced to aid in the execution of his continental system. On the 19th of February 1807 the prince generalissimo of the marine issued at Aranjuez, in the name of the King, a decree in imitation of that of Berlin. It declared that Spain was forced by Great Britain to take part in the war by outrages against humanity and policy; that all English property found at

<sup>1</sup> Am. State Papers, For. Rel. II. 635.

<sup>2</sup> Am. State Papers, For. Rel. II. 469.

<sup>3</sup> Adams's History of the United States, II. 3.

<sup>4</sup> Am. State Papers, For. Rel. II. 667.

sea would be confiscated, even though it was on board a neutral vessel and consigned to Spanish subjects; that all merchandise met with at sea, though on board neutral vessels, would be confiscated, whenever it was destined for the ports of England or the British Isles; and finally that His Majesty, conforming himself to the ideas of his ally, the Emperor of the French, proclaimed the Berlin decree to be in force in Spain.<sup>1</sup>

Decree of January 3,  
1808. On January 3, 1808, another royal decree was issued, by which, after referring to the Milan decree, it was

declared: 1. That every vessel which had been visited by an English ship, or had touched at a British port, or paid any duty to the British Government, should be considered as denationalized and be treated as English property. 2. That such vessels were to be considered as good prize. 3. That the British Isles were in a state of blockade, and that every vessel coming from a British port, or from a country occupied by British troops, should be deemed good prize.<sup>1</sup>

On the 15th of the following June Joseph Bonaparte was crowned at Bayonne as King of Spain.

Revolt of Spanish Col-  
onies in America.

When the war in Europe was brought to a close and diplomatic relations between the United States and Spain were restored a new source of complaints against the latter country had come into existence in the revolt of the Spanish colonies in America. This revolt, originally undertaken as a loyalist protest against the alien government in Spain, had continued with varying fortunes till its character as a movement for independence became too strongly fixed to be altered.

General Morillo's  
Decrees.

Spain, in her efforts to subdue the colonies, at times adopted measures to which other powers were unable to assent. Chief among these were decrees by which she sought to interdict commerce with Spanish-American ports not in her control—decrees which, though in form proclamations of blockade, were justified as municipal regulations for the enforcement of the laws of the Indies forbidding foreign powers to trade with the colonies of Spain. In the case of the revolt in St. Domingo, France had asserted a similar pretension, and the United States had not only acquiesced in but had helped to enforce it; not, however, because the pretension was well founded, but because the revolt was regarded with disfavor. In the case of the Spanish-American revolt, the pretension was dealt with as a question of law and was denied. It was brought to the attention of the United States in 1815, when the Chevalier Don Luis de Onís, then Spanish minister at Washington, on the 5th of September announced that the captain-general of Caracas, Lieut. Gen. Don Pablo Morillo, the commander of the expedition against Carthagera, was about to decree a blockade of the ports of the viceroyalty of Santa Fé, including Carthagera, and that every neutral vessel found on those coasts would be considered good prize. On March 2, 1816, he further stated that, Carthagera having been compelled to surrender, General Morillo had on December 19 decided to continue the blockade from Santa Marta to the River Atrato, and had given orders that if any vessel should be met with south of the mouths of the Magdalena or north of the parallel of Cape Tiburon on the Mosquito shore, and between

<sup>1</sup> Am. State Papers, For. Rel. III. 293.

the meridians of those points, she would be declared good prize, whatever her destination; but that the ports of Santa Marta and Porto Bello would be open to the commerce of neutrals. Against this measure Monroe, on March 20, 1816, protested on the ground that, while it declared a coast of several hundred miles to be in a state of blockade, adequate means for enforcing it did not exist. De Onis replied that there were only three ports of entry on the coast in question, and that a squadron had sailed from Cadiz to enforce the blockade; but he also argued that the measure amounted merely to an enforcement of the laws relating to the Indies, by which foreign vessels found near, or evidently shaping their course toward, the Spanish colonies were, unless specially licensed to trade with them, liable to confiscation. On July 20, 1816, instructions were sent to Mr. Erving, then minister of the United States at Madrid, in regard to vessels which had been seized at Carthagena and to citizens of the United States who had been imprisoned there. The citizens had been released, but the vessels had not been. It seems that the vessels were seized under the decree of December 15, 1815. In June 1816 a Mr. Hughes was sent by the United States to Carthagena for the purpose of reclaiming the property that had been seized. He was compelled to return unsatisfied. There had been at least three vessels brought into Carthagena, one into Santa Marta, one into Santa Margarita, and one into Puerto Cabello.<sup>1</sup>

Meanwhile a negotiation, conducted sometimes at Washington and sometimes at Madrid, was entered upon for the settlement of all differences between the two governments.<sup>2</sup> Little progress, however, was made till 1818. On January 16 in that year John Quincy Adams, then Secretary of State, proposed to the Chevalier de Onis the following terms, which do not materially differ from those offered by the United States in 1805:

"1. Spain to cede all her claims to territory eastward of the Mississippi.

"2. The Colorado from its mouth to its source, and from thence to the northern limits of Louisiana, to be the western boundary; or, to leave that boundary unsettled for future arrangement.

"3. The claims of indemnities for spoliations, whether Spanish or French, within Spanish jurisdiction, and for the suppression of the deposite at New Orleans, to be arbitrated and settled by commissioners, in the manner agreed upon in the unratified convention of 1802.

"4. The lands in East Florida, and in West Florida, to the Perdido, to be made answerable for the amount of the indemnities which were awarded by the commissioners under this arbitration; with an option to the United States to take the lands and pay the debts, or to sell the lands for the payment of the debts, distributing the amount received equally, according to the amount of their liquidated claims, among the claimants. No grants of land subsequent to the 11th of August 1802 to be valid.

"5. Spain to be exonerated from the payment of the debts, or any part of them."

De Onis's Counter  
Proposal.

January 24, 1818, De Onis, replying to this communication, offered on behalf of Spain:

1. To cede the Floridas, the United States agreeing to establish as the boundary between Louisiana and the Spanish possessions one of the branches of the Mississippi, either that of Lafourche or

<sup>1</sup> Am. State Papers, For. Rel. III. 156.

<sup>2</sup> Am. State Papers, For. Rel. IV. 422.

of the Atchafalaya, or else to adopt as a basis of settlement the *uti possidetis* of 1763.

2. To ratify the convention of 1802, with certain modifications.

3. To assist the United States in obtaining indemnity from France for spoliations committed by French privateers and consuls on the coasts and in the ports of Spain.

4. To require from the United States an engagement to enforce by effective measures its neutral obligations in the contest between Spain and Spanish America.

**Subsequent Negotiations.**

These proposals and counter proposals were followed by a long discussion of the subject of limits. On July 9, 1818, however, the King of Spain ratified the convention of 1802, and in the autumn De Onis received full instructions on all points at issue. On the 24th of October he submitted certain propositions, which embraced the cession of the Floridas and the mutual renunciation of claims, with a stipulation that the United States, besides certifying that they had not received compensation from France for any of the claims against Spain, should present an authentic statement of the prizes condemned by French consuls in Spain and of their true value, in order that Spain might claim the return of the amount from France. De Onis also proposed that the treaty of 1795 should be confirmed and preserved in full force, except as to that part of Article XV. which stipulated that free ships should make free goods.

Mr. Adams, replying on the 31st of October, said that the renunciation of the United States would be understood to extend:

1. To all claims provided for in the convention of 1802.

2. To all claims for captures by French privateers, and condemnations by French consuls, in Spanish jurisdiction.

3. To all claims for indemnities for the suppression of the right of deposit at New Orleans in 1802.

4. To claims against Spain which had been presented to the Department of State at Washington, or to the minister of the United States in Spain, since the date of the convention of 1802.

In answer to the proposal to confirm the treaty of 1795, Mr. Adams, while assenting generally, observed that the second, third, fourth, and twenty-first articles, and the second clause of the twenty-second article had either been fully executed or had been rendered inoperative by subsequent events. Whatever related to limits or to the navigation of the Mississippi had been extinguished by the cession of Louisiana by Spain to France and then by France to the United States, with the exception of the line between the United States and the Floridas, which was now to be annulled by the cession of those provinces.<sup>1</sup>

On the 22d of February 1819 a treaty in this sense,

**The Florida Treaty.** ceding the Floridas, making the Sabine the western limit of Louisiana, and renouncing claims, was concluded; but the ratifications were not exchanged till the 22d of February 1821. Apparently the principal cause of this delay was a question concerning certain large grants of land in Florida, made by the King of Spain to the Duke of Alagon, the captain of his guards, the Count of Punon Rostro,

<sup>1</sup> Am. State Papers, For. Rel. IV. 530.

one of his chamberlains, and Mr. Vargas, treasurer of the household. It seems that the petitions of the Duke of Alagon and the Count of Punon Rostro were presented to the King in November 1817; that in December the King decided that the grants should be made; and that the royal letters patent were issued in February 1818.<sup>1</sup>

The petition of Mr. Vargas seems to have been made January 25, 1818, and the letters patent bore date March 10, 1818.<sup>2</sup>

By the eighth article of the treaty it was provided that all grants of land made before January 24, 1818, by His Catholic Majesty, or by his lawful authorities, in the territories ceded to the United States, should be ratified and confirmed; but all grants of land "made since the said 24th of January 1818, when the first proposal, on the part of His Catholic Majesty, for the cession of the Floridas was made," were declared to be "null and void."<sup>3</sup>

When the treaty was signed, the three grants in question were known in the United States by rumor, and were understood by the negotiators to be included in the annulment; but in order that the question might not be left undetermined, Mr. Forsyth, who was sent as minister to Spain for the purpose of exchanging the ratifications of the treaty, was instructed to present on that occasion a declaration to the effect that the grants were so included. The Spanish Government objected to the declaration as an attempt to alter the treaty, and returned one of Mr. Forsyth's notes because of the harshness of its language; but early in 1820 it sent Gen. Don Francisco Dionisio Vives to Washington with instructions to obtain certain "explanations." In a note of April 14, 1820, General Vives, besides repeating the objection to the declaration, referred to the "scandalous system of piracy" carried on from the United States against the Spanish possessions and the property of Spanish subjects; and asked that, in order to prevent further unlawful armaments, the United States would pledge itself to cause its territory to be respected. He also asked that the United States would agree not to form any relations with the revolutionary colonies in the Spanish provinces. Mr. Adams, while assuring General Vives that the United States maintained an impartial neutrality in the contest between Spain and her colonies, declared it to be a necessary consequence of that condition of things that the government could not engage not to form any relations with those provinces. As to the grants of land, Mr. Adams insisted on their nullity.

On October 5, 1820, the Cortes in secret session advised the cession of the Floridas, and declared the grants in question null and void; and it was on this basis that the ratifications of the treaty were exchanged on the 22d of the following February.<sup>4</sup>

<sup>1</sup> The patent to the Count of Punon Rostro bears date February 6, 1818. (Am. State Papers, For. Rel. IV. 524.)

<sup>2</sup> Am. State Papers, For. Rel. IV. 510.

<sup>3</sup> The proposal referred to was that made by the Chevalier de Onis in his note to Mr. Adams of January 24, 1818. (Am. State Papers, For. Rel. IV. 464.)

<sup>4</sup> Am. State Papers, For. Rel. IV. 612, 626, 650, 701. For the purpose of settling land titles under Article VIII. of the treaty, Congress provided for

**Mutual Renunciations of Claims.** By Article IX. of the treaty, the contracting parties mutually renounced "all claims for damages or injuries which they themselves, as well as their respective citizens and subjects," had suffered prior to the date of its signature; and in order that there might be no doubt as to what this engagement comprehended it was declared that the renunciation of the United States would extend:

1. To all the injuries mentioned in the convention of 1802, which was declared to be annulled.<sup>1</sup>

2. To all claims on account of prizes made by French privateers, and condemned by French consuls, within the territory and jurisdiction of Spain.

3. To all claims of indemnities on account of the suspension of the right of deposit at New Orleans in 1802.

4. To all claims of citizens of the United States upon the Government of Spain, arising from the unlawful seizures at sea, and in the ports and territories of Spain or the Spanish colonies.

5. To all claims of citizens of the United States upon the Spanish Government, statements of which, soliciting the interposition of the Government of the United States, had been presented to the Department of State, or to the minister of the United States in Spain, since the date of the convention of 1802, and until the signature of the present treaty.

The renunciation of His Catholic Majesty was declared to extend:

1. To all the injuries mentioned in the convention of August 11, 1802.

2. To the sums advanced by His Catholic Majesty for the return of Captain Pike from the Provincias Internas.<sup>2</sup>

the appointment of a board of three commissioners. For legislation on the subject, see acts of May 8, 1822, 3 Stats. at L. 709; February 28, 1824, 4 Id. 6; March 3, 1825, Id. 102; April 22, 1826, Id. 156; February 8, 1827, Id. 202; May 22, 1828, Id. 284; May 26, 1830, Id. 405; January 23, 1832, Id. 496. For notes of judicial decisions on the same subject, see *Treaties and Conventions between the United States and other Powers, 1776-1887*, pp. 1391-1397, 1398.

<sup>1</sup> The ratifications of the convention of 1802 were exchanged at Washington December 21, 1818, and it was proclaimed on the following day. Owing to the pendency of a more comprehensive settlement, no steps were taken to carry it into effect.

<sup>2</sup> In July 1806 Lieut. Zebulon Montgomery Pike set out from St. Louis on an expedition to the sources of the Red River. Having got by mistake within the bounds of Mexico, he was conducted by the Mexican military authorities to Santa Fé, where he arrived March 3, 1807. He was hospitably treated, but was sent under escort to Chihuahua to appear before the commanding general there. On the 2d of April he reached Chihuahua and appeared before General Salcedo, who after a few days decided to return him to the United States, under escort, by way of Texas. He left Chihuahua April 28, and arrived at Natchitoches July 1, 1807. (*Cone's Expeditions of Zebulon Montgomery Pike*, II. 595-717; *Sparks's Am. Biography*, V., 2d series, 259-279.)

3. To all injuries caused by the expedition of Miranda which was fitted out and equipped at New York.'

4. To all claims of Spanish subjects upon the Government of the United States arising from unlawful seizures at sea or within the ports and territorial jurisdiction of the United States.

5. To all claims of Spanish subjects against the United States in which the interposition of the Spanish Government had been solicited before the date of the treaty, and since the date of the convention of 1802, or which had been made to the department of foreign affairs of His Majesty or to his minister in the United States.

In addition to these renunciations, stipulations were made in regard to claims arising out of certain military operations in the Floridas. These stipulations will be discussed in the next chapter.

By Article XI. of the treaty the United States, exonerating Spain from all demands for the American claims that had been renounced, undertook "to make satisfaction for the same, to an amount not exceeding five millions of dollars," and for this purpose to appoint a commission of three citizens of the United States, which should, within three years from its first meeting, "receive, examine, and decide upon the amount and validity of all the claims included within the descriptions above mentioned." The article further provided:

"The said Commissioners shall be authorized to hear and examine, on oath, every question relative to the said claims, and to receive all suitable authentic testimony concerning the same. And the Spanish Government shall furnish all such documents and elucidations as may be in their possession, for the adjustment of the said claims, according to the principles of justice, the laws of nations, and the stipulations of the treaty between the two parties of 27th October 1795; the said documents to be specified, when demanded, at the instance of the said Commissioners.

"The payment of such claims as may be admitted and adjusted by the said Commissioners, or the major part of them, to an amount not exceeding five millions of dollars, shall be paid by the United States, either immediately at their Treasury, or by the creation of stock, bearing an interest of

Francesco de Miranda, commonly known as General Miranda, was a native of Caracas, who came to the United States in the latter part of 1805 for the purpose of organizing an expedition against the Spanish dominions in South America. He sailed from New York in February 1806 on the ship *Leander*, and after procuring two schooners at Jacmel proceeded to the northern part of South America. On arriving off that coast the schooners were captured by the Spaniards; the *Leander* with Miranda on board escaped. On the schooners were thirty-six American citizens who had sailed on the *Leander* from New York, but who were transferred to the schooners at Jacmel. They were tried at Puerto Cabello on a charge of piracy, and on conviction were confined in prison at Carthage. They alleged that they were entrapped into accompanying Miranda from New York by false statements, and that when they became cognizant of his designs they were forcibly prevented from leaving his service. They sought and obtained the interposition of the United States for the purpose of securing their release. (Am. State Papers, For. Rel. III. 256; Adams's History of the United States, III. 189, 209, 238; Lloyd's Trials of William S. Smith and Samuel G. Ogden, in July, 1806; New York, 1807.)

six per cent per annum, payable from the proceeds of sales of public lands within the territories hereby ceded to the United States, or in such other manner as the Congress of the United States may prescribe by law.

"The records of the proceedings of the said Commissioners, together with the vouchers and documents produced before them, relative to the claims to be adjusted and decided upon by them, shall, after the close of their transactions, be deposited in the Department of State of the United States; and copies of them, or any part of them, shall be furnished to the Spanish Government, if required, at the demand of the Spanish Minister in the United States."

For the purpose of carrying this article into effect  
**Legislation for Executing the Treaty.** Congress passed an act, which was approved March 3,

1821, by which provision was made for the appointment of three commissioners, each at a salary of \$3,000 a year; of a secretary, versed in French and Spanish, at a salary of \$2,000; and of a clerk, at a salary of \$1,500.<sup>1</sup> By an act of May 24, 1824,<sup>2</sup> provision was made for the payment by the Treasury of the awards of the commissioners to an amount not exceeding \$5,000,000.

March 31, 1821, President Monroe appointed as commissioners Hugh Lawson White, of Tennessee; William

**Appointment of Commissioners.** King, of Maine, and John W. Green, of Virginia. Mr. Green, however, did not serve, and the President, on May 9, 1821, appointed in his stead Littleton Waller Tazewell, of Virginia. Tobias Watkins was appointed as secretary, and Joseph Forrest as clerk.

Though Mr. White had never before held office under the United States, he had repeatedly served in the legislature of Tennessee, and was twice a justice of the supreme court of that State. In 1822 he was selected by the governor of Kentucky as one of the commissioners to adjust the military land claims of Virginia. In 1825 he was elected to the Senate of the United States, where he served as chairman of the Committee on Indian Affairs, a subject of which he had formerly gained some knowledge by serving under General Sevier in the Cherokee war. He opposed the Panama Mission.<sup>3</sup>

Mr. King was a native of that part of Massachusetts which became the State of Maine. Before the separation he served in the legislature of Massachusetts. He was a member of the convention that formed the constitution of Maine, and afterward became governor of the State.

Mr. Tazewell was a native of Virginia and a graduate of William and Mary College. He was admitted to practice law in 1796 and became a member of the Virginia house of delegates. Elected to Congress in 1800 as a Republican, he voted for Jefferson as President. From 1802 to 1821 he practiced law at Norfolk. Like Mr. White, he was chosen, after his service on the Spanish commission, to the United States Senate. He was reelected, but resigned in 1834. He was a member of the constitutional convention of Virginia of 1829. He was once governor of the State, but resigned before the expiration of his term.<sup>4</sup>

<sup>1</sup> 3 Stats. at L. 639. For further appropriations see acts of April 30, 1822, 3 Stats at L. 673; March 3, 1823, 3 Id. 762.

<sup>2</sup> 4 Stats. at L. 33.

<sup>3</sup> A Memoir of Judge White, with Selections from his Speeches and Correspondence, by Mrs. Scott, one of his descendants; Philadelphia, 1856.

<sup>4</sup> Grigsby's Discourse on the Life and Character of the Hon. Littleton Waller Tazewell. Norfolk, 1860.



The commissioners held their sessions "in a building on Capitol Hill, formerly occupied by Congress." On June 9, 1821, they appeared before the Hon. Buckner Thurston, one of the associate justices of the supreme court of the District of Columbia, and each took the following oath: "I do solemnly swear that I will truly, faithfully, and diligently discharge the duties of my office, to the best of my knowledge and abilities, and that I will support the constitution of the United States." Messrs. Watkins and Forrest also appeared, and each took the same oath.

On June 14, the board—

**Rules of Procedure.**

"*Ordered*, that all persons having claims under the Treaty of Amity, Settlement and Limits, between the United States of America and his Catholic Majesty, concluded at Washington the 22nd day of February 1819, which are to be received by the Commission, do file a memorial of the same with the Secretary of the Board, to the end that they may be hereafter duly examined, and the validity and amount thereof decided upon, according to the suitable and authentic testimony concerning them, which may be hereafter required. The said memorial must be addressed to this Board; must set forth minutely and particularly the various facts and circumstances whence the right to prefer such claim is derived, and must be verified by the *affidavit* of the claimant.

"And in order that claimants may be informed of what is now considered by the Commission as essential to be averred and established, before any such memorial can be received by this Board, it is further—

"*Ordered*, that each claimant shall declare in his said memorial for and in behalf of whom the said claim is preferred; and whether the amount thereof, and of every part thereof, if allowed, does now, and at the same time when the said claim arose did, belong solely and absolutely to the said claimant, or to any other, and if any other, what person. And in cases of claims preferred for the benefit of any other than the claimant, the memorial to be exhibited must further set forth when, why, and by what means, such other has become entitled to the amount, or any part of the amount, of the said claim.

"The memorial, required to be exhibited by all claimants, must also set forth, and certainly declare, whether the claimant, as well as any other for whose benefit the claim is preferred, is now, and at the time when the said claim arose was, a citizen of the United States of America; where he is now, and at the time the said claim arose was, domiciliated; and, if any, what change of domiciliation has since taken place.

"The said memorial must also set forth whether the claimant, or any other who may have been at any time entitled to the amount claimed, or any part thereof, hath ever received any, and if any what, sum of money, or other equivalent, or indemnification, for the loss or injury sustained, satisfaction for which is therein asked.

"And, that time may be allowed to claimants to prepare and file the memorials above mentioned, it is further—

"*Ordered*, that when this Board shall adjourn to-day, it will adjourn to meet again on the 10th day of September next; at which time it will proceed to decide, whether any memorials which may have been filed with the Secretary, in pursuance of the above orders, shall be received for examination.

"*Ordered*, that a copy of these proceedings be published by the Secretary of this Board, in all the public Gazettes in which the laws of the United States are usually printed. And thereupon the Board adjourned to Monday the 10th day of September next.

"H. L. WHITE.

"WILLIAM KING.

"LITT. W. TAZEWELL.

"Attest,

"T. WATKINS, *Secretary.*"

On January 29, 1822, the following additional rule was made:

"Ordered, that after the memorial is set down for examination, either on motion of the claimant, or under the rule of this Board, no document or other evidence be added to those filed with the Secretary, except by special leave of the Board; and that no paper once filed by a claimant shall thereafter be withdrawn without such leave."<sup>1</sup>

On June 8, 1824, the board adjourned *sine die*, after having been in session for the full treaty period of three years. In announcing its adjournment, the *National Intelligencer* said: "The praise of ability, assiduity, and devotion to business will be conceded to this board; and it is admitted that the President could not have made a more judicious choice of persons to execute this arduous trust." Mr. Tazewell said that the commissioners, in order to accomplish their work with facility, took lodgings in the same boarding house, and labored together indefatigably.<sup>2</sup>

When the board adjourned there were, among the claims rejected for want of proof, eight in respect of which certain evidence requested from the Spanish Government had not been obtained.<sup>3</sup> Of these claims the principal one was that of Richard W. Meade, in which the sum of \$491,153.33 was demanded partly as compensation for supplies furnished to the Spanish Government, and partly as damages for unlawful arrest and imprisonment. In respect of both these subjects Mr. Meade had secured the diplomatic interposition of the United States; but pending the negotiations which resulted in the treaty of 1819, he informed the Secretary of State of the United States that it had been intimated to him that if he would advance a further sum of money to the Spanish Government he might obtain a grant of land in Florida sufficient to cover all his claims. The Secretary of State replied that if the cession of the Floridas was concluded, it would be provided that all grants after a certain time should be null and void. Mr. Meade then, on January 17, 1819, filed his claims with the Department of State for such protection as the Government might think proper to grant. Previously to that time, however, he had sought from the King of Spain the appointment of a commission to examine and liquidate his claims. On the 7th of May 1819, in the third month after the signature of the treaty, such a commission was appointed; and on the 19th of May 1820, after examining the original documents which the claimant had submitted, the commission rendered an award in his favor for the sum of \$373,879.83, which included his unliquidated contract claims, fourteen in number, with interest to the date of liquidation, and a gross sum as damages for his arrest and imprisonment.

By the sixteenth article of the treaty of February 22, 1819, it was provided that the ratifications of the treaty should be exchanged within six

<sup>1</sup> On February 27, 1822, the minutes of the board state that the commissioners on that day adjourned till the following day as "a manifestation of the deep sense they entertain of the loss which the nation has sustained in the death of William Pinkney," and to enable them to join in paying the last tribute of respect to his memory.

<sup>2</sup> Scott's Memoir of Judge White, 33.

<sup>3</sup> H. Doc. 212, 20 Cong. 1 sess.

months from the time of its signature, or sooner if possible. The exchange did not, as we have seen, take place till two years after the signature. This circumstance necessitated the resubmission of the treaty to the Senate, in order that the period for the exchange of the ratifications might be extended. Availing himself of this opportunity, the claimant sought to have the treaty amended so that it might not include his claim, which, being embraced in the fifth renunciation of Article IX., was one of the claims which the United States undertook by Article XI. to satisfy to an amount not exceeding \$5,000,000. The treaty, however, was not amended; and when the commissioners were appointed to carry Article XI. into effect, Mr. Meade presented to them a memorial in which he asked that his claim be treated as liquidated, and that an award be made in his favor for the amount allowed him by the Spanish commission, without regard to the *pro rata* allowance which might be made to the general mass of claimants before the board.

The commissioners were at first inclined to reject Mr. Meade's claim altogether, on the ground that, as a large part of it was for supplies furnished to the Spanish Government to enable it to carry on the war with Napoleon, it was inadmissible because of its contractual and unneutral origin. In this sense the commissioners addressed to Mr. Adams the following letter:¹

WASHINGTON, 5th March 1822.

"SIR: Several claims of indemnity have been presented to this Board by citizens of the United States, for losses sustained by reason of the breach of contracts entered into with them by the Government of Spain. In most, if not all of these contracts, the citizen stipulates to perform acts for Spain, which, as a subject of a neutral state, he could not have performed without transgressing the acknowledged belligerent rights of other nations with whom Spain was then engaged in open war; acts, therefore, which would have subjected him to the just application of the laws of war, and justified, nay, probably required, the United States to abandon such citizen to the fate of war, without making any reclamation in his behalf. It is for the performance of such acts that Spain has contracted to make compensation.

"In support of these claims, it is contended, that it was distinctly understood by the high contracting parties to the late Treaty, that claims of this description were to be included, and were intended to be provided for implicitly by the fifth renunciation of the 9th article, within the words of which all such are found; and, in proof of this assertion, a letter from the Minister of Spain, as well as the enclosed document, has been placed before this Board.

"The Commissioners feel inclined, at present, to construe this article of the Treaty in a different mode; and to reject all such claims as those above described. But as such a construction, if contrary to the intent of the high contracting parties, as is suggested, may possibly impair the faith of the United States, and lead to consequences violating even their peace, the Commissioners beg leave to submit to you the propriety of adopting some course, which may bring before them any document or suggestion by which the object and intent of the United States, in concluding this treaty, may be disclosed more fully than they are now exhibited by the article before mentioned.

"If the President is content to adopt that construction of the treaty, which the Commissioners, as at present advised, are disposed to give it, no suggestion need be made to them. But if this should not be the case,

¹ H. Rep. 58, 20 Cong. 1 sess.

as nothing will most probably operate to change the opinion which the Commissioners are disposed at present to entertain upon this subject, but a clear communication that such a construction would be violative of the intention of the high contracting parties, it will be necessary that a communication to this effect should be made to them. The mode of making it is submitted to the President.

"The want of any representative of the United States before this Board, has constrained the Commissioners to adopt the course they have thus pursued, with a full knowledge of all the objections which apply to it, not only as they refer to the President, but to the Board itself.

"We have the honor to be, &c.

"H. L. WHITE.

"WM. KING.

"L. W. TAZEWEILL.

"The Hon. The SECRETARY OF STATE."

To this letter Mr. Adams made the following reply:

"DEPARTMENT OF STATE,

"Washington, 9th March 1822.

"H. L. WHITE, WM. KING, and L. W. TAZEWEILL, Esqs.,

"Commissioners under the 11th article of the Florida Treaty.

"GENTLEMEN: In reference to the letter which I have had the honor of receiving from you, dated the 5th inst., I am directed by the President of the United States to inform you, that, in providing for the claims of the citizens of the United States upon Spain, by the treaty of 22d February 1819, it was *not* understood or intended by the Government of the United States, nor, as is believed, by the other party to the treaty, that claims arising from *contract*, as they existed at the time of the signature of the treaty, should be excluded from the benefit of the treaty. The *claims* intended to be provided for, were those specially enumerated in the renunciations, and embraced all claims, *statements of which, soliciting the interposition of the Government, had been presented to the Department of State, or to the Minister of the United States in Spain, since the convention of 1802, and until the date of the signature of the treaty.*

"As there is no limitation in the words of this renunciation, with regard to the nature of the transactions in which the claims originated, whether by contract or by tort, so none was intended. They were claims, of all of which it was believed that the only possible chance of obtaining any satisfaction to the claimants, consisted in the execution of the treaty.

"Of the absolute obligation of this Government to interpose in behalf [of] their fellow-citizens, possessing such claims, and imploring the aid of their country to obtain satisfaction for them, no very subtle or punctilious scrutiny had been made. It was the need of the claimant, and not the legal classification of his claim, for which the assistance of his Government had been solicited. The delay or denial of justice, which it was desirable to remedy, was the same, whether it was for a wrong committed, or a contract broken. The claimants have alike been *promised*, that at the negotiation of the treaty, their claims would be considered, and endeavors made to provide for them, *in common with others.*

"Whether among the contracts provided for, there were some upon which the Government of the United States, but for the treaty, must have eventually abandoned the claimants to the fate of war, was never a subject of inquiry. Those claims, it is presumed, were not the less valid against *Spain*, nor were their prospects of real satisfaction by *Spain* in any other manner, believed to be different from the rest. The Government was indeed aware that the abstract right to its interposition, of citizens who had suffered by acts of foreigners, without any co-operation of their own, was more clear and imperative than that of others who had voluntarily staked their property upon the good faith of *Spain*; and, in the course of the negotiation, a proposal was made to omit the renunciation, which included the latter class of these claims. It was, however, finally agreed to, with the full understanding, that all the claims should have the same benefit of the provisions, be subjected to the same investigation, and be

decided upon, not by any subsequent transaction between the claimant and the Spanish Government, but by the Commissioners, in the manner prescribed by the treaty, and upon such proof as they should think proper to require, for *ascertaining its amount and validity*. Of the right to include such claims in the provisions of the treaty, in cases wherein the interference of the Government had been solicited by the claimants themselves, and their claims had at their own desire been made a subject of negotiation, no doubt was entertained. It is sanctioned equally by the moral principles applicable to public law, and by the frequent practice of other civilized nations, as well as by more than one example in our own history. If indeed no such right existed, and the two Governments were not competent to make and accept such renunciation, it was certainly neither made nor intended. But that a Government, negotiating for the claims upon another Power of its citizens, at their own entreaty, is not competent to compound for them, upon terms as favorable as it can, consistently with its duties to the rest of its own nation, secure, is a doctrine, certainly not contemplated at the negotiation of the treaty, and now believed to be without warrant, either in the law or usages of nations.

"To ascertain, in the manner stipulated by the treaty, and in no other, the full *amount and validity* of these claims, as existing on the day of the signature of the treaty, the commission instituted under the 11th article of the treaty was provided. How far contracts, under the special circumstances mentioned in your letter, as applying to some of those which have been presented to the board, were *valid* contracts, it is the peculiar province of the Commissioners to decide. The Executive Government had not the means of judging of the validity of any of them; and of their amount, it could form no other than a gross estimate. But it fully believed, that the sum stipulated for the payment of them, would be adequate to the full satisfaction of every valid claim embraced by the treaty, whether the claim had originated in contract or in wrong.

"I have the honor to be, with great respect, gentlemen,

"Your very humble and ob't serv't,

"JOHN QUINCY ADAMS."

After receiving this letter, the commissioners resumed the consideration of Mr. Meade's case; and on April 16, 1823, they decided, Judge White delivering an elaborate opinion,<sup>2</sup> that they had no jurisdiction of the claim as a liquidated demand against Spain, resting on the award of the royal commission in 1820. By the treaty as well as by the act of Congress passed to carry it into effect, they were required to ascertain the "validity and amount" of claims. By this language they held that they were required to treat claims as unliquidated, and that they were precluded from admitting the liquidation of 1820 as the basis of allowance, both because it was subsequent to the conclusion of the treaty and because it was, as to the United States, *res inter alios acta*. They therefore determined that the original documents must be produced before them in order that they might ascertain the validity and amount of the claim.

Previously to this time Mr. Meade had written to the Spanish minister at Washington in regard to obtaining the documents, but had received an unfavorable response. On the 13th of May 1823, however, Mr. Nelson, the newly

<sup>1</sup> See Reminiscences of James A. Hamilton, 57. Mr. Hamilton states that he was instrumental, as counsel for one of the claimants, in bringing about the disposition of the contract question, in the manner above narrated.

<sup>2</sup> H. Report 58, 20 Cong. 1 sess.

appointed minister of the United States to Spain, was instructed to apply for the papers. On arriving at Cadiz he was unable to enter, owing to the blockade of the port by a French squadron; and it was not till December 19, 1823, that he was able to make a formal application to the Spanish Government for the documents. The government acceded to his request, but intimated that there would be some delay in furnishing the documents on account of the great quantity of them and the confusion into which the public offices had been thrown by the removal of the government from Seville to Cadiz. Intelligence to this effect was received in Washington only a few days before the expiration of the commission, and on May 29, 1824, ten days before that event, Mr. Meade's claim was rejected for want of sufficient evidence to establish its validity.<sup>1</sup>

The Supreme Court of the United States has held that the awards of the commissioners under Article XI., though final and conclusive as to the rejection or admission of any claim, were not conclusive as to conflicting interests in the sum awarded; that after the validity and amount of the claim had been ascertained by the award of the commissioners, the rights of the claimants to the fund, after it had passed into their hands, were determinable by the established courts of justice in the ordinary course of judicial proceedings; and that a right to compensation from Spain, held by an underwriter under an abandonment by his insured, for damages and injuries arising from an illegal capture, passed to the assignees of the underwriter under the provisions of the United States Bankrupt Law of April 4, 1800.<sup>2</sup>

In a case rejected by the board, it was held that the claimant, by failing to apply to the board for a rehearing, had precluded himself from obtaining Congressional relief, though he may have acted on the assumption that such an application made to the commission in another but separate case would embrace his claim.<sup>3</sup>

Efforts were subsequently made by Mr. Meade and his heirs to obtain compensation from the United States, and the claim, after having been made the subject of many Congressional reports, was referred to the Court of Claims "for adjudication thereof, pursuant to the authority conferred upon said court by any existing law to examine and decide claims against the United States, referred to it by Congress." (Joint Resolution of July 25, 1866, 14 Stats. at L. 611.) The Court of Claims held, Nott, J., dissenting, that the case having been dismissed by the board of commissioners under the act of 1821, the court had no power under the acts defining its jurisdiction to reopen it. (*Meade v. United States*, 2 Nott & Huntington, 224.) This judgment was affirmed by the Supreme Court. (*Meade v. United States*, 9 Wallace, 691.)

<sup>2</sup> *Comegys v. Vasse*, 1 Peters, 193. It may be observed that the award of the commissioners in this case was made to the assignees, and that the money was paid to them by the United States. Subsequently this action was brought against them by the underwriter to recover back the money, on the ground that the claim against Spain, held by him under the abandonment, did not pass to his assignees under the bankrupt law. In fact, the award of the commissioners was sustained.

<sup>3</sup> H. Report 55, 20 Cong. 2 sess.

When the board adjourned its records and papers were in accordance with the treaty deposited in the Department of State. Attorney-General Taney advised that the Secretary of State could not legally deliver the papers up to the claimants, and that an act of Congress authorizing such delivery would constitute a violation of the treaty.<sup>1</sup>

On June 8, 1824, the day of their final adjournment, the commissioners made the following report:

Commissioners' Final Report.

"To the honorable the SECRETARY OF STATE OF THE U. S.:

"The undersigned Commissioners, citizens of the United States, appointed by the President, by and with the advice and consent of the Senate, having at length performed the duties with which they were charged, under and by the 11th Article of the Treaty of Amity, Settlement and Limits, concluded at Washington, between the United States of America, and his Catholic Majesty, on the 22d day of February 1819, now beg leave to present an account of their proceedings in the following Report.

"The undersigned having received their appointments as Commissioners aforesaid, from the President of the U. S., in conformity to the 11th Article of the Treaty aforesaid, and having been required to repair to the City of Washington, in order there to organize a board, immediately complied with this direction. After their arrival in this city on the 8th day of June 1821, they were instructed by a communication of that date, addressed to them by the Honorable John Quincy Adams, Secretary of State of the U. S., 'immediately to form themselves into a board and to commence the discharge of the important duties incident to the high trust committed to them.' Whereupon, on the 9th day of the same month, they did form themselves into a board, by taking an Oath for the faithful, diligent discharge of their duties, before the Honorable Buckner Thurston, one of the Associate Judges of the District of Columbia, conformably to the provisions of the said Treaty.

"The Commission being thus organized, forthwith proceeded to adopt such rules and forms of proceeding as seemed best adapted to attain the objects of its creation; and the following mode was established as that proper to be pursued. An Order was made, whereby all persons having claims under the Treaty aforesaid were required to file a memorial of the same with the Secretary of the board, to the end that they might be thereafter duly examined, and the validity and amount thereof decided upon, according to the suitable and authentic testimony concerning the same, which might be required. Such memorials were directed to be addressed to the Commission; to set forth minutely and particularly the various facts and circumstances from which the right to prefer such claim was derived; and to be verified by the affidavit of the claimant. And that claimants might be notified [of] what was considered by the Commission as necessary to be stated and so established, before any claim could be received for examination, a particular description was given of the averments required, wanting which they were informed that no memorial would be so received. A copy of these orders was directed to be published in all the gazettes in which the laws of the U. S. were usually printed, for the information of all persons who might be interested. And that all claimants might know and conform themselves to these directions, the board on the 14th of June 1821, after making these orders, adjourned to meet again in the month of September then next ensuing.

"On the 10th of September 1821, the Commission again assembled in pursuance of its adjournment. At this period they found 302 memorials had been filed with the Secretary, conformably to the orders before referred to. All these memorials were read, considered and disposed of during this session, as to [the] board seemed right; and then the Commission, having nothing further before it, adjourned on the 26th of September

until the ensuing January, with a view of allowing further time to claimants, to renew any applications which might have been refused, because of their not conforming to the orders herein before referred to, or to present new claims which might not yet have been exhibited.

"During this session the Commission having received sundry memorials for examination of the proofs which might be offered thereafter to support the same, it became necessary to prescribe the course proper to be adopted in relation to the exhibition of such proofs. An order was therefore made directing that all memorials which had been or might thereafter be received, should be *set down for examination* after the expiration of six months from the date of their reception, but that if any claimant desired his memorial to be set down before the expiration of that period, this might be done at any time, upon application for that purpose; and if, after the lapse of the six months aforesaid, any claimant could show good cause why his memorial should not be then set down, upon application made and such cause shown further time would be allowed for the exhibition of proofs. During this session, also, the commission having suspended its decision as to some memorials which had been presented, in order to allow itself more time for considering the important, novel and difficult questions they presented, an order was made (upon the application of the memorialists) that every claimant might be permitted to support his claim by the arguments of counsel, provided all such arguments were committed to writing and filed with the Secretary. And before its adjournment, the Commission made a *second* order, again requiring all claimants to exhibit their claims before the next session, which order was also directed to be published for the information of all to whom it might apply.

"On the 7th of January 1822, the Commission again assembled in pursuance of its adjournment. At this period they found 768 new memorials had been filed with the Secretary, conformably to the former orders before referred to. All these memorials were read and considered, and, together with most of those the decision as to which had been before suspended, were during the session disposed of, as to the board seemed right. And then the Commission having nothing further before it, adjourned on the 11th of March until the ensuing June, in order to allow more time to claimants to present their applications. With a view to induce them to do so, the Commission before adjourning made a *third* order, again requiring all claimants to exhibit their claims before the next session; notifying them in it, that after that period no memorial would be received, without good cause shown why the same had not been before exhibited, in pursuance of the repeated orders requiring the same to be presented. And this order was directed to be published for their information and government.

"On the 11th of June 1822 the Commission again assembled in pursuance of its adjournment. At this period they found 534 new memorials had been filed with the Secretary, conformably to the former orders before referred to. All these memorials were read and considered, and, together with all others not before acted upon, were during this session disposed of as to the board seemed right.

"Besides these claims, 20 other memorials (accompanied by satisfactory reasons for the delay in not presenting them before) were also received, read, considered, and disposed of in like manner. The period of six months having now elapsed, since many of the memorials had been received, the Commission during this session also proceeded (in pursuance of their order before referred to) to *set down for examination* all such, to postpone the setting down of which no good cause was shown. And [it] likewise proceeded to the examination of all the cases so set down (except when good cause was shown for a continuance), *allowing or disallowing* the cases so examined, as to the board seemed right, and directing the cases *allowed as valid* to be deferred until a further time, when the amount of the same would be adjusted and finally ascertained. Having then nothing further before it, the Commission adjourned on the 2nd of July 1822, until the ensuing October, with the view of allowing further time to the claimants, where claims had been received for examination, to collect the proofs in support of the same.



"As much more than three years had now elapsed since the date of the aforesaid Treaty, nearly eighteen months had expired since its ratification by both of the high contracting parties, and more than a year had passed since the organization of this board, during which last period three several orders had been uttered by it, at different times, requiring claimants to exhibit their claims, the undersigned believe they might have been well justified in closing the door at this time, against the reception of any new claims; and might with much propriety have dedicated all the residue of the time prescribed in the Treaty to the examination and adjustment of such as had been received. Hoping, however, that with proper diligence this laborious task might be performed within the remaining term, and desirous not to debar any of their fellow-citizens of the relief to which they might possibly be entitled, the Commission still continued their last order, authorizing the presentation of claims at any time; and requiring only, that the claims presented should be accompanied by proper evidence to explain why they had not been before preferred. Under this order, at the next and each succeeding session of the board, new memorials have been presented to the number of 1859, all of which have been read, considered, and disposed of, as to the board seemed right. Nor has the reception of any claim been refused at any time, upon the mere ground of its coming too late, until the 31st of May last.

"On the 15th of October 1822, the Commission again assembled in pursuance of its adjournment. At this session the board proceeded as before to set down for examination all such memorials as had been received six months previously, except those in which good cause was shown for postponement. Having thus arranged its business, the board next proceeded to examine the proofs exhibited in support of the several cases so set down for examination, except such as applied to claims for the continuance of which some sufficient reason was assigned. And having disposed of all these as before, the Commission, having nothing further before it, again adjourned on the 22nd of November 1822, until the ensuing February, for the same cause before stated.

"On the 18th of February 1823 the Commission again assembled in pursuance of its adjournment, and having arranged and disposed of all the business before it as at the preceding session, adjourned on the 18th day of April 1823 until the ensuing July, for the same cause before stated. During this session the Commission found itself under the necessity of adopting some rule which might expedite the business before it. The term prescribed by the Treaty was drawing fast to a close—much remained to be done to complete the performance of the duties committed to the board, and its progress in this task was retarded, not only by the apparent delay of the claimants in setting down for examination claims which had been received, but also by the interruption which the presentation and reception of new memorials incessantly produced. Many of the claims were intimately connected. Altho' preferred by different persons, they yet depended upon the selfsame facts, the evidence of which was often to be sought and collected by piecemeal from several different cases. Whenever therefore one claim was set for examination, if any other growing out of the same circumstances was not acted upon in like manner, the board was under the necessity either of examining the same voluminous mass of proof again and again, or of postponing the examination of cases which were ready until others could be made so. Besides, in cases depending (as sometimes occurred) upon parol proof only, there was obvious impropriety in deciding anything until the whole proof which could be adduced was brought forward. These considerations induced the Commission before it adjourned to make a new order, by which it announced its determination, at its next session, to set down for examination all memorials without distinction, which had been filed six months; and required all new memorials to be accompanied (when presented for reception) with the proof relied upon to support the same; and that such memorials, when received, should be immediately set down. This order the Commission directed to be published as before, for the information of all who might be affected by it.

"On the 15th day of July 1823 the Commission again assembled in pursuance of its adjournment, and, acting according to the determination expressed in their last order, arranged and disposed of all the business before it as at the preceding session, and then adjourned on the 5th day of August 1823 until the ensuing November, for the same cause stated. During this session it became obvious that the business before the Board could not possibly be completed, if much further indulgence was granted to the applicants, by postponing the examination of the cases set down; the board therefore announced most distinctly its purpose of examining every case, in its order, at their next session, and of then finally disposing of it.

"On the 12th of November 1823 the Commission again assembled in pursuance of its adjournment, and, finding it impossible to complete its business without a continued session, it has had no recess since that day. All the cases being now set down for examination, the board for the purpose of affording the longest possible period for preparation to such of the claimants as might not yet have obtained the proper proofs, commenced with examining only such cases as were voluntarily offered to them for examination by the claimants themselves. Having disposed of all those, the examination of the remaining cases, in the regular order in which they stood upon the calendar, was next gone into and completed, altho' in many of these the parties were not prepared, and had no proof whatsoever. The only exception permitted to this course was in those cases in which applications for documents had been made to the Spanish Government in pursuance of the 11th Article of the Treaty. All these cases were suffered to remain unexamined, until a very recent period, inasmuch as no negligence could be properly imputed to the claimants for not exhibiting such proofs. This process of examining memorials and pronouncing upon their validity, according to the nature of the proofs offered to sustain them, which process the board had commenced in June 1822, and had continued at every succeeding session as the claimants were prepared, or the nature of the duties confided to the Commission had permitted, was not completed until the 25th of January 1824. Indeed since that period several new memorials have been presented, received, and allowed or rejected. Having finished this part of its duty, the board next commenced the labor of adjusting and ascertaining the amount of the claims which had been received, examined and allowed as valid. This task occupied the board with but little intermission ever afterwards, and when completed ought probably to have ended its labors. But inasmuch as many of the claimants had been forced by the rules adopted by the Commission to set down cases for examination, at a time when they had not obtained any proof to sustain them; and as consequently there were some rejected merely for the want of proof, the board, before entering upon the business of ascertaining amounts, made an order, whereby permission was given to all claimants who wished their claims *re-examined* to file a petition for that purpose, accompanied by any new proof they might have procured after the first decision. This order was made on the 31st of December 1823, and limited the time for exhibiting such petitions to the 17th of the following month. As the object of this order was merely to enable the Commission to complete its duties within the time prescribed by the Treaty, so soon as it was seen that this might be accomplished without a strict adherence to either the letter or intent of the rule, but little regard was paid to it by the board. Applications for the re-examination of every kind of claim have been received, altho' not offered until after the time limited. New evidence has been suffered to be introduced up to the last moment possible, and new arguments have been received, and attentively considered, upon almost every proposition, the assumption or application of which had at first caused the rejection of any case whatsoever. In short, the board having once yielded to this departure from its rule, was under the necessity of re-examining more than once almost every case which had been rejected, and reconsidering many of the memorials which were at first refused. The undersigned do not, however, regret this additional labor, since it has served in some instances to change the opinion which

had been at first entertained, both as to the rejection and admission of many claims.

"The undersigned have felt it a duty they owed not less to themselves than to the high contracting parties in the Treaty, some of the provisions of which they have been appointed to carry into execution, to exhibit this summary of the modes of proceeding they thought proper to adopt. Confirmed as it will be found to be by the Journal and Record of their proceedings which accompany this report, they venture to hope, that both the high contracting parties under whose authority they have acted, will see in it, that every proper opportunity has been offered to those who might have claims under this Treaty to exhibit them; that ample time and fair occasion has been allowed, to support such claims as were exhibited, both by proof and argument; and that if any of the demands which have been examined have been either rejected, curtailed, or improperly admitted, such errors cannot have resulted from any want of patient labor, or proper attention, in those composing this Commission. In the variety, novelty, and intrinsic difficulty of the multitude of questions which have been presented for the determination of this board, there exist so many causes for distrusting the correctness of its decisions, that the undersigned dare not flatter themselves they have not often erred. The very great probability that such errors may have been committed would certainly give them much pain, but for the confidence they feel that they have faithfully discharged all their duties, according to the best of their imperfect skill and ability.

"In order that each of the high contracting parties might be enabled to understand the precise ground upon which every determination of this Commission has proceeded, either in rejecting, receiving, allowing, disallowing, or in ascertaining and fixing the amount of, every claim that has been submitted to its consideration, the undersigned would willingly have stated in their records, and would here repeat, every principle the board has asserted, and the mode in which it has been applied to each claim. But the limited period allowed by the Treaty for the performance of all the duties committed to its charge, rendered this impossible. More than 1,800 cases, each involving many and very distinct propositions, have been determined by this board—most of these cases differed so much from all others, either in the nature or extent of the principles applicable to their decision, that they admitted no useful classification of this kind—and to have made a special and detailed report of the facts and principles of each would have been a task, the performance of which was seen, at a very early period, to be utterly incompatible with the completion of the duties of the board within the time prescribed. It occurred to the board, too, that in the progress of its work it was highly probable, as new cases were presented, new facts might be disclosed, and new information furnished, which ought to and would occasion a revision and reversal or modification of any principle which might at first seem to be correct, in relation to any particular case. The Commission therefore abstained at first from asserting any general rules of decision, except in terms so broad and comprehensive as to leave the board free to apply them as the facts might at last require. These facts were collected and deduced from the evidence found not in any one, but often from very many different cases, as well as from other sources. To have referred generally, therefore, to the evidence in any given case for its facts, would have been often delusive; and to have stated this evidence in each would necessarily have lead to endless repetition, and imposed a task of almost interminable labor. The Commission for these reasons, in recording any of their decisions, forebore to insert in their journal the reasons which were considered as justifying and requiring them—altho' such reasons were always stated orally at the time, to the party to be affected by them, in order that he might have an opportunity of repelling them thereafter by new evidence or argument, if he thought proper to make such an attempt. And now on looking back upon their work when it is completed, the Commission can only state its mere outline, and refer for their rules of determination to the following general principles, from which they have never knowingly departed.

In determining as to the reception of any memorial, the board has ever assumed the facts stated therein, and verified by the affidavit of the claimant, to be true. If these facts made such a case as seemed to be embraced by any of the renunciations enumerated in the 9th Article of the treaty, or if any doubt existed upon this point, the memorial was received; otherwise it was rejected. When the proofs offered to support any claim received for examination came to be examined, if the testimony (being suitable and authentic) satisfactorily made out and established the same case recited in the memorial, without any material alteration or variation of its facts, the memorial was thereupon allowed as valid. But if the proof exhibited did not satisfactorily establish the facts stated in the memorial, or, establishing these facts, disclosed others which, if known before, would have occasioned its rejection, or if such circumstances were discovered in any other manner, the claim was not allowed.

"In determining what cases were embraced within the renunciations of the 9th Article of the Treaty aforesaid, the Commission has seldom found much difficulty, except in relation to those which were supposed to be provided for by the 4th and 5th. In relation to the last, the Commission adopted the following principles: That it was not sufficient to entitle an applicant to the benefits of this Treaty, for him to assert and show that, being a citizen of the U. S., he had presented a statement of his claim upon the Spanish Government to some of the functionaries therein mentioned and within the time described, soliciting in such statement the interposition of the Government of the U. S. The failure to have presented such a statement, to such officers, within the time prescribed, was considered as a sufficient cause to justify and require the rejection of all claims that were not provided for by any other of the renunciations than the fifth. But, to bring such claims within the provisions of this renunciation, it was necessary to show that the claim which had been so presented was in itself a *good* claim. And in deciding upon the character of such claims, the Commission has considered none as good, but such as the Spanish Government ought to have satisfied, if this Treaty had never been concluded. And in determining upon the liability of the Spanish Government under such supposed circumstances, the Commission have uniformly taken as their guide the laws of nations, and the stipulations of the Treaty concluded between the U. S. and Spain on the 27th of October 1795. Acting in pursuance of this general rule, the Commission has refused to receive as good claims against Spain any of those which sought redress for the numerous wrongs and injuries inflicted by the power of France, upon the rights of citizens of the U. S., within the ancient limits of old Spain, during the period intervening between the invasion and expulsion of the French armies in 1813. The general principles of the public law were not considered as imposing a liability upon any nation for wrongs done to others within its territory by its own open enemy. Nor did the Treaty of 1795 impose upon Spain any obligation to do more than to endeavor by all means in her power to protect and defend American effects, which should be within the extent of her jurisdiction, and to use all her efforts to recover and cause the same to be returned, if taken within the same—obligations which, as they regard the cases now referred to, no doubt existed with the Commission Spain felt and would have satisfied, if within her ability so to do.

"While engaged in determining upon the extent of the liability of the Spanish Government, if this Treaty had never been concluded, the undersigned were deeply impressed with the delicacy of their situation. As American citizens they could but sympathize with their countrymen for the injuries they had sustained in many cases, where very equivocal evidence had been regarded by the Spanish tribunals as conclusive to establish facts, which, when assumed, would fully show the propriety and rectitude of Spanish adjudication and Spanish procedure. And they could not but doubt in other cases the correctness of some of the principles asserted by the Spanish authorities as being deducible from the laws of nations and the Treaty of 1795, as well as the construction sometimes given by the Spanish tribunals to their own municipal regulations. In all such cases, however, the undersigned have struggled to suppress every sentiment which citizens of a

nation, the rights of whose people have been so extinguished, would naturally entertain; and, endeavoring to review these proceedings with the impartial eye of those utterly indifferent to the causes which produced them, the Commission has pursued this course. In relation to facts asserted by the Spanish courts, and deduced by them from testimony equivocal, doubtful, or contradictory, this Commission has never felt itself at liberty to rely upon its own opinion as to these, even where that opinion might probably have been different, if derived solely from the same evidence; nor has it permitted the introduction of new proof here, to affect Spanish decisions given under a different state of circumstances, fairly exhibited. The principle which has governed this board in all such cases has been, that if this Treaty had never been made, the Spanish Government ought not to have been liable even for the errors of its ordinary courts (whether these were errors of fact or law) unless such error was evident, palpable, "*et in re minime dubia*"; when, and when only, they would cease to be mere errors, and assume the appearance of premeditated wrongs. Confiding, therefore, in all the facts asserted by the Spanish tribunals when derived from testimony equivocal, doubtful, or contradictory; confiding also in the expositions made by these tribunals of their own laws; and even yielding sometimes to the supposed correctness of Spanish adjudications, altho' founded upon assumed principles of public law of very questionable existence; this Commission has in no instance regarded a claim as good against Spain, when opposed to such decisions of its own courts, or considered a seizure as unlawful, when sanctioned by the unreversed judgment of such a forum, so deduced. And it has only pursued a different course when the determination of the Spanish tribunals was founded upon doctrines of public law, to which enlightened nations have not generally yielded a willing assent, or upon principles in diametrical opposition to the Treaty of 1795. Having once adopted this rule of respect for Spanish adjudications in cases where this board might probably have pronounced a different opinion, if it had felt itself at liberty to decide at all, the Commission has of course been compelled to admit as good some claims founded upon the reversal of such adjudications, concerning which equal difficulty might otherwise have been felt, if such decrees had never been passed.

"As to the claims supposed to be comprehended within the 2nd renunciation of the 9th Article of the Treaty, the undersigned have to state that the construction given by the Commission to that renunciation has not confined it to cases denoted by the mere terms therein used. These would include none other than condemnations by 'French consuls within the territory and jurisdiction of Spain.' The board, however, has considered the term 'Consuls' here introduced, as merely descriptive of the persons who for the most part exercised the French prize jurisdiction in foreign states, where it was suffered at any time to be exercised, and not as intended to confine the claims here provided to condemnations by such officers *only*. It has been regarded rather as an example than as a limitation; and therefore the Commission has received and allowed many claims, founded upon condemnations in the territories of Spain, uttered by other French agents than those denominated 'Consuls,' believing that the injury designed to be here provided for was that which was produced by the Act of Spain in suffering French jurisdiction to be exercised within her territory, no matter by what appellation this jurisdiction might be designated. So, too, the terms 'territory and jurisdiction of Spain,' according to a strict interpretation of them, might possibly be confined to places appertaining to Spain absolutely and exclusively. But the board has considered itself at liberty to regard the terms as intended to be understood in a different sense; and, construing them as meaning to declare the liability of Spain for all condemnations by French tribunals suffered to exert authority within the limits of the countries subject at the time to her power, the board has not hesitated to receive and to allow all claims for such condemnations, uttered in the city of Santo Domingo prior to the year 1801. For altho' by a Treaty concluded between France and Spain many years antecedent to this period, the Spanish part of the Island of Hispaniola was ceded by Spain to France, yet until January 1801 the possession of

this territory was never surrendered to France in pursuance of that Treaty; but the Spanish power and authority continued to be exerted there as before.

"A class of cases embracing very many claims, similar to each other in some particulars, have been again and again pressed upon the Commission in every stage of its proceeding, and presented in every possible aspect which the learning, ingenuity and zeal of their advocates could discern. The board, however, felt itself constrained to reject most of them. The cases alluded to are those of captures made by French privateers, where the prizes were carried within the territory and jurisdiction of Spain and, altho' not condemned by any tribunal then existing, were nevertheless there disposed of by the captors. This description comprehends a very large proportion of all the claims that have been exhibited to the board, as well in number as amount.

"It is not probably comprehended by the terms used in any of the renunciations of the Treaty (whatever latitude of construction may be given to these terms), unless it may be the 5th, and but a part of the cases referred to can be affected by this renunciation, since there are but few of them comparatively, statements of which, soliciting the interposition of the Government of the U. S., have been presented within the period, or to the functionaries, therein mentioned. This circumstance operated with great force upon the Commission in producing the opinion they have expressed. The attention of the high contracting parties had been obviously drawn to the subject of captures of American vessels made by French privateers, where the prizes had been conducted within the Spanish territory. The alleged facts attending many of these cases had been laid before them in statements soliciting the interposition of the Government of the U. S. And as the Treaty had notwithstanding (in the 2nd renunciation of the 9th article) expressly limited the claims on account of French captures, by the fact of French *condemnation* within the Spanish territory, it could not readily be conceived that so large a class of American sufferers as those whose claims were not comprehended within this 2nd renunciation, would have been left altogether unprovided for, unless of purpose. Many considerations operated to confirm this opinion. Spain most probably never would have consented to acknowledge, or the U. S. have pressed, her liability for acts done by France, unless these acts were done in violation of some duty which Spain had taken upon herself, and the observance of which forbade her to suffer such acts to be performed. None could contend rightfully, however, that it was any violation of the general duties which one nation owes to any other, to suffer the cruisers of a co-belligerent and allied nation (as France then was) to send their prizes into, and to use, her ports and harbours for all purposes of safety or convenience. And if Spain had contracted any particular obligation with the U. S. not to suffer this to be done in relation to their vessels, which might be captured by any other nation, such obligation was to be sought for in the Treaty of 1795. That Treaty, however, merely provided 'that each party should endeavor by all means in their power, to protect and defend all vessels and other effects, belonging to the citizens or subjects of the other, which should be within the extent of their jurisdiction, by sea or by land; and that they should use all their efforts, to recover and cause to be restored to the right owners, their vessels and effects, which might have been taken from them, within the extent of their said jurisdiction.' The latter part of this provision obviously applies to vessels and effects taken within the extent of the territories of the contracting parties, and has no application therefore to cases like these, in which the captures were all made on the high seas, or beyond such jurisdiction. And the former part, while it imposes upon the contracting parties the obligation to endeavor by all means in their power to protect and defend all vessels and other effects belonging to the citizens or subjects of either, which should be within the extent of the jurisdiction of the other, by sea or by land, neither binds them to dispossess a belligerent captor of his prize, nor to exert the power of wresting from the court of such captor the high and responsible authority of deciding upon the legality of the capture. The vessels and other effects belonging to the citizens or subjects of either of the contract-

ing parties, captured 'jure belli' by the cruisers of any third nation, were to be protected and defended, while they continued to be within the territories of the other; but the captor might leave the territory to which he had resorted whenever he thought fit, taking with him his prize, even before its condemnation anywhere. And if this was condemned by any competent tribunal before it left such territory, it thereupon ceased to belong to its former owner, whose rights being extinguished by such condemnation, the '*casus fuderis*' then ceased to exist, and the obligation to apply.

"This interpretation of the Treaty of 1795 induced the Commission to reject all cases of French captures, where the prize was carried within the Spanish territory, in which there existed regular French condemnations, by competent tribunals, within the French territory, and where no act was done or suffered by Spain prior to such condemnation, contrary to her obligation to protect and defend the property while it continued American once within her jurisdiction. There remained, however, a large number of claims of the description referred to above, in which no French condemnations were produced, and to which the rule last mentioned would not apply. The greater part of these grew out of voyages undertaken by citizens of the U. S., to or from the ports of Hispaniola, then commonly designated as Brigand ports. As to such of these as were undertaken after the commencement of the act of Congress passed on the 28th of February 1806, suspending the commercial intercourse between the U. S. and these ports, the Commission could feel no hesitation. It has never considered itself bound to regard those as citizens of the U. S., intended to be protected by any part of this Treaty, who engaged in a commerce forbidden by the laws of their own country, or who sought to shroud their true character or pursuits by any false and fraudulent covering whatsoever. This rule of exclusion, however, the undersigned are pleased to be able to state, has not applied to many of the cases before them. Another rule, furnished by this Treaty itself, has been held to exclude all the other claims which grew out of voyages to the ports of Hispaniola, closed by the French *arrêts* of the 22nd of June and 9th of October 1802 and March 1st, 1804, which voyages commenced after a notice of those *arrêts* was had in the ports of the United States. The Commission, considering the ancient state of things as remaining unaltered, and the sovereign power of France over her colony of Hispaniola as still subsisting, at the time these and other decrees were uttered by that sovereignty, which forbid all trade with the ports described, felt itself bound to regard all such voyages (to or from these prohibited ports) illegal as against France. France undeniably possessed the legitimate right of enforcing her own laws, so far as they related to her own dominions, and none could claim the privilege of violating them. Whatever may have been the loss imposed, therefore, upon an American citizen, for his actual or intended violation of these known laws, he has no just cause of complaint against the power he meant to offend; nor would his own state properly aid or in any way support the cause of such of its guilty citizens, by reclamation against the sovereign offended by his misdeed. And if for these reasons the sufferer or his government had no just cause of complaint against France, the actual author of the loss, it would be difficult to show how Spain could be held accountable therefor by either. Nay, the 14th article of this Treaty itself seemed to the Commission conclusive upon this point. Why should Spain thereby require to have, and the U. S. agree to present to her, an authentic statement of the claims provided for by this Treaty for the injuries they suffered from France, that Spain may avail herself of the same, if, as the argument supposes, France had done no injury and was not accountable to any for that which her cruisers had done in this respect?

"These principles, altho' they operated to the exclusion of most of the cases embraced within the description above referred to, did not apply to all the claims on account of prizes made by French privateers, which were said to have been carried and disposed of within the territory and jurisdiction of Spain, without any condemnation. Other cases remained of fair and proper voyages, forbidden by no law whatever, and growing

out of an open and perfectly innocent trade. For the protection and defense of such, Spain was bound unquestionably to exert all the means in her power while within the extent of her jurisdiction. And wheresoever any sale, or other improper disposition of prizes of this description, has been proved to be made within the Spanish territory, to the injury of the right owner, being a citizen of the U. S., and within the knowledge of any proper officer of the Spanish Government, the Commission has held Spain liable, and therefore allowed the claim. In order to fix such liability upon any sure and reasonable basis, however, the board has considered it right to require of the claimants in all cases, that the transaction complained of was made known to some proper officer of the Spanish Government, and its interposition required, except where the occurrence was one so open and flagrant as to furnish evidence in itself that it must have been known to and approved by the Spanish Government of the place.

"In adjusting the amount of the claims allowed, the Commission has adopted these principles. Regarding the fund provided by the Treaty as designed to indemnify claimants for actual losses sustained, and not to realize profits which might or might not have been made, the board has generally taken up the voyage at its commencement, and allowed the value of the vessel and cargo at that time. To the value of the vessel, two-thirds of a fair freight for the passage in which the loss occurred has been added. A fair premium of Insurance for the risk of such a passage has been also added to each of these insurable subjects. And the costs and expenses, incurred in defraying their rights, have been allowed to all claimants who have paid such, and have offered any evidence from which the sums so paid might be inferred. Such has been the general mode of estimating the quantum of loss to be indemnified, in most of the cases where the loss has been total. In those where the loss has been partial, and in a few where the loss has been total, to which the rules now stated could not apply, different principles of adjustment analogous to these have been resorted to, the board taking care to modify these principles to suit the facts existing in each particular case. Thus a reasonable charter has sometimes been given in lieu of freight strictly so-called, where the precise voyage was not fixed. And a fair demurrage has been applied as the standard of damage produced by the illegal detention of a vessel. And here the undersigned feel it their duty to state that more than one moiety of the amount of all the claims allowed, and a larger proportion of those rejected, have been preferred by underwriters. As the loss by them complained of resulted directly and immediately from their own contract, and was to be traced to the illegal acts of others only remotely through that contract; and as, for entering into this contract, they had received a valuable consideration, in the premium paid for taking upon themselves the very risk which had produced their loss, the Commission at a very early stage of their proceeding decided that no underwriter *as such* had any claim upon this fund provided by the Treaty. The claims of American citizens, therefore, who came before the board claiming for the losses they had sustained by insuring the property of foreigners, which had been illegally taken by France or Spain, were never received. And it was only when the American citizen, who had sustained a loss provided for by the Treaty, having been indemnified against this loss by an American underwriter, had abandoned, or was bound to abandon and assign his interest in the subject insured to the assurer, that the claims of underwriters have ever been received. But, claiming as assignees of a party who had a good claim, these their derivative claims have always been allowed for the sum by them insured and paid, where that sum did not exceed the true value of the subject insured, according to the principles settled by the board, for ascertaining this value, as above stated.

"In making such allowances to underwriters, the Commission was well aware that its effect would be to allow them more than they had lost, by the amount of the premium received from the party insured, which premium he had voluntarily paid and must have lost in any event. So, too, in making the allowance of freight, the Commission was well aware that the full wages of seamen had not been paid, probably, in any of the cases



where such freight was given. But, in these and many other cases which occurred, the board, having ascertained the full amount of the loss, distributed this amount so ascertained amongst the different parties claiming it before them, and seeming to have a right to receive it (no matter in what character), without deciding, or believing itself possessed of the authority to decide, upon the merits of conflicting claims to the same subject. To whom of right the sum thus awarded when paid may belong, or for whom, how, or in what degree, the receiver ought to be regarded as a Trustee of the sum received, were questions depending upon the municipal laws of the different States of the Union, the application of which to the facts existing in any case the board did not feel itself authorized to make, and therefore abstained from instituting any enquiry as to the facts necessary to such a decision. These remarks the Commission think it proper thus to make, lest their award may be considered as barring and finally settling pretensions into which this board have in truth neither made, nor believe itself authorized to make, any examination whatever; but have purposely left open, for the adjudication of others, who will have better means of ascertaining the facts.

"Having thus stated the general principles which the Commission has thought it right to adopt and to apply, in receiving, examining, and deciding upon the amount and validity of all the claims that have been exhibited before it, the undersigned, with a view of showing what these claims were, have caused to be subjoined sundry schedules. The first of these, marked A, exhibits a list of all the memorials which have ever been presented to the Commission, except those which merely asked for re-examination. In this list the memorials are numbered progressively from 1 to 1859, in the order in which they were presented. It contains the name of the memorialist and the name of the vessel referred to (when such is the case), and designates which of these memorials the Commission refused to receive for examination, for the reasons hereinbefore stated.

"The second schedule, marked B, exhibits a list of all the memorials aforesaid which were received and examined. In this list these memorials are distinguished by the numbers annexed to them in the schedule A, and are arranged under the names of the different vessels to which they refer, where they do so refer, and by that of the memorialists where no particular reference is made to any vessel. In this list are also designated all those memorials which the Commission refused to allow as valid, for some of the reasons hereinbefore stated.

"The third schedule, marked C, exhibits a statement of the several sums allowed for the loss sustained in each of the cases mentioned in the schedule B, and therein not noted as having been disallowed, together with the aggregate amount of all these several allowances, viz: the sum of \$5,454,545.13, and likewise the different memorialists to whom that sum has been awarded and distributed.

"And the fourth schedule, marked D, exhibits a list of the sums allowed in schedule C, distributed amongst the different parties in interest, or their proper representatives, according to their different claims. These sums of course correspond in their amount with those stated in the preceding schedule; and this schedule, marked D, the Commission exhibits as its final award, in which is ascertained the full amount and validity of all the claims exhibited to it, for which Spain was liable to citizens of the U. S., and to which the renunciations contained in the Treaty of 1819 extend.

"In order to enable the U. S. to comply completely with the provisions of the 14th Article of this Treaty, and to present to Spain an authentic statement of the prizes made from citizens of the U. S. by French privateers, for which injuries Spain was regarded by the Commission as having been liable, the undersigned have annexed hereto a fifth schedule, marked E (extracted from that marked C), in which is contained a list of all the vessels of the U. S. captured by French privateers, for which any allowance has been made by this board, and of the true value so allowed. For the particulars of such captures, the Commission begs leave to refer to the vouchers and documents produced before the Commissioners, relative to the claims on this account. These vouchers and documents, together with

the records of their proceedings, the undersigned Commissioners have directed their Secretary to deposit in the Department of State of the U. S. in pursuance of the provisions of the 11th Article of the Treaty aforesaid.

"The undersigned will add nothing further than to say, that as the full amount of the sums allowed to the different claimants is \$5,454,545.13, while the Treaty limits the extent of the liability of the U. S. 'to an amount not exceeding five millions of dollars,' the Commission found it necessary to abate each claim allowed 'pro rata.' This ratable abatement of each claim according to its amount equals 8½ per cent. So that the claimants, instead of receiving the *full* amount of their respective claims as allowed, will be entitled to receive only the balance, after this per centage is deducted. The schedule D will show the full amount of the claim allowed, the amount after the abatement, being the balance due the claimants, which is the sum awarded by this board to them respectively. This schedule D is in addition to the documents the Commission have believed it to be their duty to furnish, for the purpose of showing the sums awarded, and to whom due. And as it has been merely extracted from the journal of its proceedings, which will be lodged with the Department of State, the schedule itself may be transferred by it to the Department of the Treasury, as a guide to direct its payments. And the Commission would recommend its speedy publication for the information of all those whom it may concern, or the adoption of any other mode which the proper officers of the U. S. may think more convenient for the attainment of this object.

"All of which is respectfully submitted.

"Washington, 8th June, 1824.

"H. L. WHITE.

"W. KING.

"LITT. TAZEWELL."

"Attest:

"T. WATKINS."

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<sup>1</sup> This report was published in the *National Government Journal*, June 26, 1824, and a list of the awards in the next number. The following papers of the commission are in the Department of State: 1. Journal. 2. Register of claims received. 3. Claims adjudged. 4. Claims adjudged: awards and decisions. 5. Claims admitted. 6. Report of Commissioners, with a list of awards. There is also a thin quarto volume, containing an alphabetical list of the names of claimants, which was begun but not completed.

## CHAPTER D.

### EAST AND WEST FLORIDA CLAIMS.

Acting on the assurance of Livingston and Monroe that West Florida was comprised in the cession of Louisiana,<sup>1</sup> Congress, in extending the customs laws over the ceded territory, authorized the President, whenever he should deem it expedient to do so, to erect "the bay and river Mobile" and the adjacent territory into a separate district.<sup>2</sup> When the Spanish Government protested against this measure, assurances were given that the United States, reserving their claims in that quarter as a subject of discussion and arrangement with Spain, meditated in the mean time no act inconsistent with the peace and friendship existing between the two nations.<sup>3</sup> In the summer of 1810, however, while the Spanish monarchy was in the throes of dissolution, a revolution occurred in West Florida. Baton Rouge was seized, and a convention was held by which the independence of the province was declared and an application made for its admission into the American Union.<sup>4</sup> The President repulsed this application, but determined to take possession of the territory as part of the Louisiana purchase. It was accordingly occupied by the American forces, but only as far as the River Pearl. The territory between that stream and the Perdido was permitted still to remain in the possession of Spain.<sup>5</sup>

On the 3d of January 1811 President Madison sent to Congress a secret message in which he recommended the expediency of authorizing the Executive to take temporary possession of any part of the Floridas, in pursuance of arrangements with the Spanish authorities; or without such arrangements, in case those authorities should be subverted and there should be apprehension of the occupancy of the territory by another foreign power. Acting on this message, Congress, in secret session, on the 11th of January, "taking into view the peculiar situation of Spain and her American provinces," and "the influence which the destiny of the territory adjoining the southern border of the United States may have upon their security, tranquillity, and commerce," resolved that the United States could not "without serious

<sup>1</sup> Am. State Papers, For. Rel. II. 564.

<sup>2</sup> 2 Stats. at L. 254.

<sup>3</sup> Message of President Jefferson to Congress, November 8, 1804, Am. State Papers, For. Rel. I. 63.

<sup>4</sup> Am. State Papers, For. Rel. III. 394-400.

<sup>5</sup> Am. State Papers, For. Rel. III. 539; Adams's History of the United States, V. 305-315.

inquietude see any part of said territory pass into the hands of any foreign power," and that "a due regard to their own safety" compelled them "to provide, under certain contingencies, for the temporary occupation of the said territory," the territory so occupied to be held "subject to future negotiation." As to West Florida, Congress had, as we have seen, already empowered the Executive to exercise acts of possession; but as East Florida unquestionably still belonged to Spain, it was necessary to confer upon the President special powers in regard to that province in order to insure the object expressed in the resolution. Congress therefore authorized the President to take possession of and occupy all or any part of East Florida, "in case an arrangement has been, or shall be, made with the local authority of the said territory, for delivering up the possession of the same, or any part thereof, to the United States; or in the event of an attempt to occupy the said territory, or any part thereof, by any foreign government." For the purpose of occupying and holding the territory, the President was authorized to employ the Army and Navy of the United States; and the sum of \$100,000 was appropriated "for defraying such expenses as the President may deem necessary for obtaining possession as aforesaid, and the security of the said territory."

January 26, 1811, Mr. Monroe, as Secretary of State, instructed Gen. George Matthews and Col. John McKee, as commissioners for carrying the act of Congress into effect, to repair to East Florida with all possible expedition, keeping their mission secret; and if they should find Governor Folk or the local authority existing there inclined to surrender the province in an amicable manner, they were to accept the abdication in behalf of the United States, and, if necessary, agree to restore the country at a future period to the lawful sovereign. They were authorized, if necessary, to assume the debts due by Spain to the inhabitants of the territory; to guarantee titles to land; to permit the Spanish civil functionaries to retain their offices, and, if necessary, to advance a reasonable sum for the transportation of the Spanish troops. If no such arrangement could be made they were instructed to keep on the alert, and on the first undoubted approach of a foreign power to take possession of the territory. In that event they were to exercise a sound discretion as to making promises, taking care to commit their government no further than necessary. A similar course was enjoined in regard to that part of West Florida still held in the name of Spain.<sup>1</sup>

It does not appear that McKee acted under this commission; but Matthews accepted it, repaired to the Florida frontier, and took up his residence at St. Marys. He found, however, that the governor and local authorities were loyal to Spain, and not inclined to deliver up the territory; nor was there any sign of an attempt on the part of any foreign power to seize it; and the general contentment of the inhabitants, arising from the agricultural prosperity of the country, was enhanced by the profits of the vastly increased trade which the United States nonimportation act diverted to the neighboring province and of which Fernandina, on Amelia Island,

<sup>1</sup> 3 Stats. at L. 471; Am. State Papers, For. Rel. III. 571.

<sup>2</sup> H. Report 99, 20 Cong. 2 sess.; Am. State Papers, For. Rel. III. 571.

was the chief *entrepôt*. Nevertheless, there was along the border a certain element, largely composed of persons who had emigrated from the neighboring States, which, though incompetent to effect a revolution without external aid, was willing to undertake a revolt if properly supported. This support Matthews promised, and on March 14, 1812, more than a year after his mission began, a party of men, supplied with arms partly from the United States arsenal at Point Peter, assembled at Roses Bluff, across the river from St. Marys, and raised the standard of revolt against the government of East Florida. On the 16th of March they attacked the town of Fernandina. Coincidentally, several United States gunboats took a position opposite the town, and the Spanish commandant, having been informed that they intended to assist the insurgents, surrendered to the latter, who took possession of the place and raised the "patriot flag." The next day General Matthews crossed the river with a detachment of the regular army and took formal possession of the town in the name of the United States, subject to the President's approval. Within a few days the insurgents, accompanied by a body of United States regulars and some volunteers from Georgia, set out for St. Augustine. Their procedure was systematic. Marching a little in advance of the American forces, the insurgents would take possession of the country and raise the "patriot flag," and then in the character of "the local authorities," surrender the territory to General Matthews, who would receive possession of it in the name of the United States. In this way he received possession of the country all the way to St. Augustine, to which place siege was laid in the latter part of March.

Revocation of Matthews's Powers.

The measures adopted by General Matthews for obtaining possession of Amelia Island and other parts of East Florida were disavowed by the United States, and his powers were revoked. Governor Mitchell of Georgia was appointed to succeed him, with instructions to withdraw the American troops and restore to the Spanish authorities the country thus taken from them. Monroe, referring to the employment of American troops to dispossess the Spanish authorities by force, said: "I forbear to dwell on the details of this transaction, because it is too painful to recite them." At the same time Governor Mitchell was directed to obtain from the Spanish authorities "the most satisfactory assurance" with respect to the immunity of those inhabitants who had acted with General Matthews. This proved to be a troublesome subject of negotiation, and together with certain other causes operated to postpone the final evacuation of the province till May 1813.<sup>1</sup>

Injuries to Inhabitants of East Florida.

The transaction thus briefly narrated was attended with lamentable results to the inhabitants of East Florida. A judge of the United States, charged with the duty of investigating the subject, described the injuries inflicted by the invaders in the following terms:

"The difficulty of obtaining supplies for such a force led them at once to look to the resources of the country; and the large droves of cattle with which the country then abounded were immediately and unhesitatingly seized upon to relieve their necessities, and foraging parties, consisting both of regular troops and patriots, were sent out in all directions

<sup>1</sup> Am. State Papers, For. Rel. III. 543, 544, 545, 571.

to collect cattle and other means of subsistence for the army. These foraging parties most generally consisted of the patriot or volunteer troops, sometimes under the command of a regular officer, but the fruits of their expeditions were usually shared by the American and patriot troops indiscriminately. The cattle which they drove into camp, or collected and retained at the posts and stations in the country, to be used from time to time as they were wanted, were used by the regulars as well as the volunteer troops and patriots. \* \* \* Besides the camp of the American and patriot troops before St. Augustine, there were also, from time to time, several other camps and stations about the country occupied by United States troops or volunteers and patriots, from whence marauding and foraging parties were constantly going forth; and in the course of the summer and fall almost every plantation and farm had been visited and plundered. Most of them had been abandoned by their owners, but whether abandoned or not, the foraging parties usually helped themselves to what they wanted or could find. The corn on hand in the corn houses, of the previous year's crop, was eagerly sought for and used up; the fences thrown down, and the growing crops exposed to destruction, as well as used or fed upon by their horses; movable property of every description plundered or destroyed, and buildings and fences burned, sometimes from design (especially when the owners were particularly loyal to the Spanish Government), and often by accident, from camp fires, or negligence in occupying the buildings; and the cattle and hogs in the ranges killed or driven off to the camps of the invading army. And this state of things continued, but growing daily worse and worse, until the American troops were finally withdrawn from the province in May 1813.

"During this time, however, and before the evacuation of the province, other American troops came into it besides those which have already been mentioned as having made the first incursion; some small parties or companies of regulars or volunteers joined the forces before St. Augustine; and in the summer or fall of 1812 Colonel Newnan entered the province with a battalion or detachment of volunteers, and after remaining a short time on the St. John's river made an expedition into the interior against the Seminole Indians. \* \* \*

"A detail of some of the more revolting instances of robbery and plunder and wanton destruction on the one hand that occurred during this period, or of individual cases of hardship, ruin, and beggary on the other, is hardly called for, and perhaps not proper in this general statement, though they might tend much to illustrate the general character of the injuries of that period. Suffice it to say that before or when the United States troops finally evacuated the country, the whole inhabited part of the province was in a state of utter desolation and ruin. Almost every building outside of the walls of St. Augustine was burned or destroyed; farms and plantations laid waste; cattle, horses, and hogs driven off or killed, and movable property plundered or destroyed; and in many instances slaves dispersed or abducted. So far as the destruction of property of every kind was concerned, the desolation of the Carnatic by Hyder Ali was not more terrible and complete."<sup>1</sup>

Invasion of West  
Florida in 1814.

In 1814, during the war between the United States and Great Britain, General Jackson, having destroyed the power of the Creek Indians, determined to reoccupy Mobile, which had been occupied by the United States during the war and then abandoned, and to seize Pensacola, which had been the principal source of supplies of the Creeks in their hostilities with the United States. In this design he was confirmed by the fact that the waters of the Gulf of Mexico were becoming the theater of active military demonstrations on the part of the British. Early in July 1814 he gave orders for the reoccupation of Mobile Point. In the following month Major Nicholls, an Irish

<sup>1</sup> Bronson, J., Case of Ferreira, S. Misc. Doc. 45, 34 Cong. 3 sess. 46, 47.

officer, with a force of marines seized Fort Barrancas, six miles below Pensacola, and began to collect a force of Creeks, at the same time proclaiming his intention to invade Louisiana; and in September a British force attempted to reduce Fort Bowyer, which had been established by the United States at the entrance of Pensacola Bay in 1813. The attempt failed, and early in November 1814 Jackson marched to Pensacola and took possession of the place—a step which led to the immediate evacuation of Fort Barrancas by the British. In his dispatches General Jackson praised the correct conduct of his troops, but, as a matter of course, the march of a considerable military force, only a part of which was composed of regulars, and of which a portion was made up of friendly Indians, was attended with some depredations on private property.<sup>1</sup>

West Florida and the  
Seminole War.

December 26, 1817, Mr. Calhoun, who was then Secretary of War, ordered General Jackson to Fort Scott, Georgia, to take command of the forces of the United States against the hostile Seminole Indians. General Jackson reached Fort Scott on the 9th of March, and on the following day assumed command. On the 25th of March, writing to Mr. Calhoun, he reported that "the Indians had demanded arms, ammunition, and provisions, or the possession of the garrison of St. Marks of the commandant," and that the governor of Pensacola had said he "presumed possession would be given from inability to defend it." "The Spanish Government is bound by treaty," said General Jackson, commenting on this situation, "to keep her Indians at peace with us. They have acknowledged their incompetency to do this, and are consequently bound by the law of nations to yield us all facilities to reduce them. Under this consideration, should I be able, I shall take possession of the garrison as a depot for my supplies, should it be found in the hands of the Spaniards, they having supplied the Indians; but if in the hands of the enemy I will possess it for the benefit of the United States, as a necessary position for me to hold, to give peace and security to this frontier, and put a final end to the Indian warfare in the South." General Jackson also stated that he had ordered supplies for Fort Crawford by water, and had written to the governor of Pensacola that if he interrupted their passage he should "view it as aiding our enemy and treat it as an act of hostility." Immediately after writing this letter, General Jackson began an active movement against the Indians, whom he attacked and drove before him; and, believing that some of the hostiles had fled to St. Marks, he directed his march to that fortress. "As advised," he said, "I found that the Indians and negroes combined and demanded a surrender of that work; the Spanish garrison was too weak to defend it, and there were circumstances reported producing a strong conviction in my mind that, if not instigated by the Spanish authorities, the Indians had received the means of carrying on the war from that quarter; foreign agents who have been long practicing their intrigues and villainies in this country, had free access into the fort; St. Marks was necessary as a depot, to insure success to my operations. These considerations determined me to occupy it with an American force." The fortress

<sup>1</sup> H. Report 99, 20 Cong. 2 sess.; Adams's History of the United States, VIII. 317-330; Am. State Papers, Mil. Aff. I. 698-708.

was accordingly occupied;<sup>1</sup> and General Jackson, having heard that the Indians at war with the United States had free access to Pensacola, determined to make a movement west of the Appalachicola and, if the report proved to be correct, occupy Pensacola. On the 21st of May he entered and occupied the fort of St. Michael commanding that town; but the fort made only a show of resistance. The governor of Pensacola had previously retired to Fort Carlos de Barançás; and General Jackson now demanded of him the surrender both of this fortress and of the town. The demand was refused, and on the 25th of May the fortress was besieged. It surrendered on the evening of the 27th after having made a spirited resistance. In August 1818 the United States ordered St. Marks and Pensacola, with the Barançás, to be restored to Spanish authority.<sup>2</sup> During these operations of the United States forces against the Seminoles much property of Spanish subjects was plundered and destroyed. Spain protested against General Jackson's course, and demanded indemnity. The United States, while ordering the captured places to be evacuated, assumed responsibility for his acts.<sup>3</sup>

The ninth article of the treaty between the United States and Spain of 1819 closes with the following stipulations:

"And the high contracting parties, respectively, renounce all claim to indemnities for any of the recent events or transactions of their respective commanders and officers in the Floridas.

"The United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers, and individual Spanish inhabitants, by the late operations of the American army in Florida."

In his annual message of December 3, 1822, President Monroe recommended that legislation be adopted to carry the foregoing stipulations into effect by vesting the necessary power in the district court of the United States at Pensacola or in some special tribunal. By an act of March 3, 1823, Congress authorized and directed the judges of the superior courts at St. Augustine and Pensacola "to receive and adjust all claims, arising within their respective jurisdictions, of the inhabitants of said territory, or their representatives, agreeably to the provisions of the ninth article of the treaty with Spain, by which the said territory was ceded to the United States." By the second section it was provided that, in all cases in which the judges should decide in favor of the claimants, "the decisions, with the evidence on which they are founded, shall be \* \* \* reported to the Secretary of the Treasury, who, on being satisfied that the same is [*sic*] just and equitable, within the provisions of the said treaty, shall pay the amount thereof

<sup>1</sup>Among the persons found in the fortress was an Englishman named Arbuthnot, who, with another Englishman named Ambrister, captured near "Bowlegs town," was, by order of General Jackson, tried by a court-martial and executed for exciting "savage and negro war." (Wharton's Int. Law Digest, I. sec. 348a; Parton's Life of Andrew Jackson, ch. 34; Am. State Papers, Mil. Aff. I. 207, et seq.)

<sup>2</sup>Am. State Papers, Mil. Aff. I. 690-696.

<sup>3</sup>Am. State Papers, For. Rel. IV. 496, 776-808.



to the person or persons in whose favor the same is adjudged."<sup>1</sup> Where the decision was adverse to the claimant, no further proceedings were authorized.

**Claims Prior to 1818**      When the judges came to execute this statute, claims  
**Rejected by the**      were made before them for losses occasioned by the  
**Treasury.**      three invasions of 1812-13, 1814, and 1818; and such  
                              claims in each class as were established by the proofs

were allowed and certified to the Secretary of the Treasury. The judge for East Florida, at St. Augustine, allowed many of the claims of 1812-13; and the judge for West Florida, at Pensacola, allowed claims not only of 1818, but also of 1814. The claims of 1814 were 43 in number, and their nominal amount was \$84,970.63. The judge for West Florida, before whom they were preferred, awarded upon them in all \$72,639.06. He disallowed \$12,331.56, for insufficiency of proof.<sup>2</sup> When the decisions in favor of the claimants were reported to the Secretary of the Treasury, Mr. Crawford, who then held that office, set aside all the awards for 1814, on the ground that General Jackson's entrance into West Florida was justified by the law of nations, and that the claims were not within the treaty. In the exercise of a similar discretion Mr. Rush, as Secretary of the Treasury, in 1826 rejected the claims for losses by the invasion of East Florida in 1812-13, on the ground that the "late" operations of the American army in Florida, mentioned in the treaty, meant only the operations of 1818 and comprehended none of an earlier date.

**Decisions on Various**      In passing upon the cases before him Mr. Rush  
**Claims.**      rejected certain claims for the loss of slaves on the  
                              following grounds:

"It is not believed that the words or intention of the ninth article of the treaty will warrant a confirmation of the judge's decision in these cases. The slaves had all left their masters prior to the invasion of 1818, and were a part of the community of Suwanee Indians for the time being—at least when that invasion took place. Those who were killed by the attack on that Indian settlement, or who were blown up at the negro fort, must necessarily be lost to their owners; and as to those who were taken prisoners, the owners must be left to such remedies for recovering possession of them as the common course of law would afford. On these grounds, if on no other, the cases are, one and all, excluded from confirmation."

Other claims were rejected by Mr. Rush, in which it appeared by the evidence that the damages and losses were occasioned by hostile Indians who were opposed to the American army. Mr. Rush rejected these claims on the ground that their allowance would involve "a forced construction of the treaty, the principle of which, if admitted, might open a door to numerous and remote claims never within the contemplation of the contracting parties."<sup>3</sup>

<sup>1</sup> 3 Stats. at L. 768.

<sup>2</sup> S. Ex. Doc. 391, 29 Cong. 1 sess.; S. Rept. 482, 29 Cong. 1 sess.

<sup>3</sup> H. Doc. 67, 24 Cong. 2 sess. The blowing up of the "negro fort," mentioned by Mr. Rush, took place in 1816. The fort in question was erected by the British during the war of 1812, at Bonavista, on the eastern branch of the Apalachicola River, 15 miles above its mouth and 120 miles east of Pensacola. After the close of the war it was used by Indians

From the executive decisions rejecting the claims prior to 1818, *en masse*, the claimants appealed to Congress. They pointed out that the word "late" was

not in the Spanish text of the treaty. The English and Spanish texts of the two paragraphs in question are as follows:

"And the high contracting parties, respectively, renounce all claim to indemnities for any of the recent events or transactions of their respective commanders and officers in the Floridas.

"The United States will cause satisfaction to be made for the injuries, if any, which by process of law shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

"Las altas partes contratantes, renuncian reciprocamente todos sus derechos á indemnizaciones por cualquiera de los ultimos acontecimientos y transacciones de sus respectivos comandantes y oficiales en las Floridas.

"Y los Estados Unidos satisfarán los prejuicios, si los hubiese habido, que los habitantes y oficiales Españoles justifiquen legalmente haber sufrido por las operaciones del Exército Americano en ellas."

It was pointed out by Mr. Joseph M. White, the delegate from Florida, in an argument submitted to the Committee on Foreign Affairs in 1826, that no word corresponding to *late* was to be found in the Spanish draft of the treaty. It was also urged by him that instead of the word "Florida," which is found in the English draft, the Spanish has the words "en ellas," referring by necessity to "las Floridas," and consequently including both East and West Florida, which would not have been the case had it been intended to provide exclusively for the losses of 1818, which were almost wholly confined in West Florida.

By a report of March 10, 1826, the Committee on Adverse Reports. Foreign Affairs reported adversely to the claimants.<sup>1</sup>

The report stated that the Secretary of the Treasury, before excluding the claims of 1812-13 and 1814, applied to the Chief Magistrate, under whom the treaty was framed, and was confirmed by him in the opinion that Article IX. embraced no claims prior to 1818. As to the English and Spanish texts of the treaty, the committee, while admitting that the word "late" was not in the Spanish text, maintained that this did not alter the sense of the stipulations; that though the word "operaciones" was not qualified by any term corresponding to the word "late," yet the two clauses were connected in the Spanish text by the conjunction "y," and that the term "ultimos" in the first paragraph necessarily limited the sense of the word "operaciones" in the second. These

and fugitive slaves as a rendezvous and stronghold. General Jackson on April 23, 1816, demanded of the governor of Pensacola the "prompt interference of the Spanish authorities to destroy or remove from our frontier this banditti." The governor, while concurring in General Jackson's view as to the character of the establishment, stated that he was unable to act in the matter without orders from his captain-general, to whom he had written on the subject nearly two months previously. The fort was attacked by United States forces July 27, 1816, and, a hot shot entering the magazine, was blown up and completely destroyed. (Am. State Papers, For. Rel. IV. 555-560.)

<sup>1</sup>H. Report 112, 19 Cong. 1 sess.

views were formally adopted by the Committee on the Judiciary in the next House of Representatives.<sup>1</sup>

February 26, 1829, Mr. Everett, from the Committee on Foreign Affairs, made an elaborate report in favor of the payment of the excluded claims, accompanied with a bill for that purpose.<sup>2</sup> The committee would, said Mr. Everett, forbear to pursue a verbal discussion of the treaty as being necessarily unsatisfactory in its nature. The renunciation and the stipulation for indemnity seemed to be coextensive; and this being so, if the losses sustained by the Spanish inhabitants in 1812 and 1814 were not provided for, then Spain had not renounced her claims on the United States for those losses. This would be to suppose that a considerable and not the least embarrassing part of the controversy between the two governments remained unsettled by the treaty of 1819, though it was intended, and in its preamble it was declared, to be a settlement of "all their differences and pretensions." While the American Executive regarded the stipulation for indemnity as extending only to the cases in 1818, it was evident that the inhabitants of East and West Florida understood it to extend to the losses in 1812 and 1814, since all but five of the cases presented to the judge of the superior court of East Florida were for losses sustained in 1812-13. The committee, said Mr. Everett, had come to the conclusion that the claims of 1812-13 and of 1814 were entitled to the favorable consideration of Congress. The claims of 1812-13 appeared to be highly meritorious. An agent of the United States, clothed with large discretionary powers and with the control of funds from the public treasury, and having a force of United States troops, approached and entered Florida. It was natural that the inhabitants should repose great confidence in his promises of protection. Although his movements were disavowed by the Executive, their most important results were to a certain extent sanctioned by the occupation of the province, on behalf of the United States, for a twelvemonth after General Matthews was superseded. The transaction was one no doubt of a peculiar nature, not likely to occur again in our history, and difficult to be adjusted, in all its consequences, on ordinary principles of legislation. The committee were disposed to recommend a liberal course; and this they did with the more confidence as the amount involved, though highly important to individuals, in its importance to the United States bore no comparison with the beneficial consequences of the cession of Florida. The case of the claimants of 1814 was, said Mr. Everett, somewhat different; but it appealed, in the judgment of the committee, in a high degree to the equity of Congress. The Government of Spain was in 1814 at peace with that of the United States; but the authorities of West Florida were unable, had they been disposed, to prevent the violation of their territory by the hostile arms of Great Britain, aimed against the United States. In this situation of things the American commander, without express authority from his government, but in the exercise of a wise discretion for the public good, found it necessary to invade a province whose political situation was so anomalous. The committee found it stated by the delegate from Florida, whose means of information were ample, "that it was

<sup>1</sup> H. Report 16, 20 Cong. 1 sess.

<sup>2</sup> H. Report 99, 20 Cong. 2 sess.

proved by all the witnesses examined that every effort was made by the commanding general and his officers to preserve the property of the inhabitants inviolate." It was, however, in the nature of things that some losses should have been sustained by the inhabitants of a character entitled to equitable compensation. The committee could not but think that the situation of provinces circumstanced as were the Floridas was entitled to great tenderness, looking at them as distant appendages of a weak government unable to vindicate their neutrality; occupied against the law of nations by the enemy of the United States, and thus necessarily exposed to the hostile approach of an American force; acquired by the American Government as an indemnity for wrongs inflicted by the Spanish Government, from which the Floridas derived no benefit, and shortly afterward admitted into the political family of the Union. The committee deemed it expedient by the adoption of a liberal policy to remove forever any remaining ground of irritation and discontent.

Owing to the lateness of the session no action was taken on Mr. Everett's bill.

February 9, 1830, Mr. Archer, then chairman of the **Mr. Archer's Reports.** Committee on Foreign Affairs, reported a bill to allow the claims of 1812-13, but not those of 1814.<sup>1</sup> He excluded the claims of 1814 partly on the ground of Article V. of the treaty with Spain of 1795, by which the contracting parties pledged themselves "to restrain by force all hostilities on the part of the Indian nations living within their boundaries." On January 20, 1832,<sup>2</sup> and March 25, 1834,<sup>3</sup> he presented a similar recommendation from the same committee, on each occasion with a bill to give it effect.

On June 26, 1834, the bill became a law.<sup>4</sup> By the **Provision for East Florida Claims.** provisions of this act the Secretary of the Treasury was "authorized and directed to pay \* \* \* the amount awarded by the judge of the superior court at St. Augustine \* \* \* for the losses occasioned in East Florida by the troops in the service of the United States in the years 1812 and 1813 in all cases where the decision of the said judge shall be deemed by the Secretary of the Treasury to be just;" and the judge of the superior court at St. Augustine was "authorized to receive, examine, and adjudge all cases of claims for losses occasioned by the troops aforesaid in 1812 and 1813 not heretofore presented to the said judge or in which the evidence was withheld in consequence of the decision of the Secretary of the Treasury that such claims were not provided for by the treaty of February 22, 1819." One year was allowed for the presentation of such claims. It was also provided that in no case should an award be made or paid where the claimant was not at the time of his loss an actual subject of Spain.

Under this act many claims were adjudicated; and **Adjudication of Claims.** when Florida was admitted to the Union, the unfinished business pending before the judge at St. Augustine in relation to the East Florida claims was transferred to the judge of the dis-

<sup>1</sup> H. Report 176, 21 Cong. 1 sess.

<sup>2</sup> H. Report 223, 22 Cong. 1 sess.

<sup>3</sup> H. Report 64, 23 Cong. 2 sess.

<sup>4</sup> 6 Stats. at L. 569.

strict court of the United States for the northern district of Florida.<sup>1</sup> Subsequently the district judge was specially authorized to receive and adjudicate certain claims, among which was that of Ferreira, administrator of Pass.<sup>2</sup> From 1823 to 1849 the judges allowed on the claims of 1812-1813 upward of a million dollars, exclusive of interest.

When the Secretary of the Treasury came to exercise the authority conferred upon him in respect of the payment of the awards, his Department subjected them to a reexamination. The rules of decision adopted by Mr. Rush were acquiesced in, Mr. Woodbury, the Secretary of the Treasury, deeming himself to be unauthorized "to revise or overrule the same without the special authority of law to that effect."<sup>3</sup> The Treasury Department also held that there were three descriptions of cases, included in the claims for losses in 1812-13, in which the provisions of the act of 1834 did not warrant an allowance: 1. Where the loss sustained was shown by the evidence to have been occasioned by the acts of Indians hostile to the Spanish Government, but not cooperating with the American army. 2. Where it appeared that the claimants had joined the "patriot" troops who were acting in hostility to the Spanish authorities, and the property was taken and destroyed by the Spanish forces. 3. Where the loss was shown to have been occasioned by hostile Indians opposed to the troops of the United States. Claims were also rejected where the losses were shown to have been occasioned not by the direct acts of the United States troops, but by the acts of lawless inhabitants of Florida who took advantage of the disturbed situation of the province, arising from the presence of an invading army, to commit depredations. Mr. Woodbury being of opinion, however, that injuries of this class might "be fairly deemed as consequential, suggested the propriety of a special statutory provision for them."<sup>4</sup> It was advised by Attorney-General Grundy that the United States was bound to make compensation to claimants under the treaty for slaves carried away or killed by the United States forces and thus totally lost to their owners, as well as for the detention of slaves that were wrongfully taken but afterward restored.<sup>5</sup> Attorney-General Cushing advised that the extraordinary expenses incurred by a claimant in living at St. Marys, whither he retired after the destruction of his property, were too remotely consequential to form a subject of compensation under the article.<sup>6</sup>

In respect of these rules of decision no general controversy occurred. In most cases the principal amount allowed by the judges was paid.<sup>7</sup> But against the Treasury's action on the question of interest, a general complaint arose. The rule of the judges in making up their awards was to allow damages to the amount of the value of the property at the time of the injury, and to add to this, as satisfaction for the loss of the use and profits of the property,

<sup>1</sup> Act of February 22, 1847, 9 Stats. at L. 130.

<sup>2</sup> Act of March 3, 1849, 9 Stats. at L. 788.

<sup>3</sup> H. Doc. 67, 24 Cong. 2 sess.

<sup>4</sup> H. Doc. 67, 24 Cong. 2 sess.

<sup>5</sup> 3 Op. 389.

<sup>6</sup> 6 Op. 530.

<sup>7</sup> S. Ex. Doc. 158, 48 Cong. 1 sess. 12-17.

interest at the rate of 5 per cent during the period when no provision of law existed for the presentation and payment of the claims. On December 20, 1836, Mr. Woodbury, in deciding upon the claim of John Gianopoli, which was the first one disposed of by the Treasury, allowed it "with the exception of interest, which it is believed has not been allowed in claims similarly situated."

**Contention of Claimants.**

This decision was contested by the claimants on various grounds. They contended (1) that the Secretary of the Treasury exceeded his authority under the act of 1834 in assuming to revise the "amount" of the award; (2) that the word "legalmente," for which the words "process of law" stood as the equivalent in the English text of the treaty, required a judicial as distinguished from an executive determination of the claims; and (3) that while the action of the Secretary of the Treasury was based solely on his view of the usage of his Department in respect of domestic claims, the law of nations, as well as the treaty, required the allowance of interest as part of a just indemnity.

**Amount of Interest Disallowed.**

In a report of January 15, 1839, Mr. Woodbury stated that the amount of the claims paid by the Treasury up to that time was about \$285,000, and that the amount of the awards then pending but not disposed of was about \$250,000. If interest was allowed from the date of the injury, as was generally done by the judges, it would amount probably to \$500,000 more. Mr. Woodbury further stated that the Treasury Department had acted on the theory that its duty was not a formal one, and suggested that if Congress should think the awards of the judges ought to be final, it should change the law "so as to require simply that the amount of the award for principal, or for principal and interest, as deemed most proper by Congress, shall in all cases be paid on its presentment to the Treasury Department. It is believed," he added, "that no allowance for interest has been heretofore approved by the department."<sup>1</sup>

From first to last the sums awarded by the judges as interest amounted to almost the same as the sums awarded as principal—the sums allowed as principal, in the cases in which interest was awarded, amounting to \$1,089,747.91, while the total of interest was \$1,199,668.58. The whole amount allowed and paid by the Treasury was \$1,024,741.44.<sup>2</sup>

**Later Discussions of Interest Question.**

As early as December 3, 1849, Mr. Calderon, the Spanish minister at Washington, presented the question of interest to the United States, at the same time declaring that he believed the "judgments of the courts to be in conformity with the express stipulations of the treaty and the public law which controls such decisions."<sup>3</sup> October 22, 1869, the question was again presented by Mr. Lopez Roberts, then Spanish minister to the United States. In the mean time it has been the subject of many reports and opinions in the various departments of the government. In 1851 the Supreme Court of the United States decided that it had no jurisdiction to entertain an appeal from the decision of the judge of the district court of the United

<sup>1</sup> S. Ex. Doc. 97, 25 Cong. 3 sess.

<sup>2</sup> S. Ex. Doc. 158, 48 Cong. 1 sess. 12-17.

<sup>3</sup> S. Ex. Doc. 205, 46 Cong. 2 sess.

States for the northern district of Florida, proceeding under the act of 1834.<sup>1</sup> In 1857 the Court of Claims held, Scarburgh, J., dissenting, that it could afford no relief.<sup>2</sup> It was held by several Attorneys-General that the matter was, as to the executive department, in the absence of new legislation, *res judicata*.<sup>3</sup> And such was the answer made by Mr. Fish, as Secretary of State, to Mr. Lopez Roberts.<sup>4</sup> "I will not enter into the question," said Mr. Fish, "whether that decision [of Mr. Woodbury in 1836] was correct or erroneous, for the precedent has been so often and so long permitted to control the disposition of \* \* \* claims under the ninth article of the treaty of 1819 as to preclude the executive branch of this government from disregarding or reversing it. The judicial branch has declared itself incompetent to deal with the subject. It has thus become a practical necessity to await further legislation by Congress before taking any fresh action in relation to these claims."

On March 1, 1880, President Hayes invited the attention of Congress to the subject;<sup>5</sup> and on the 13th of the next May he communicated to the Senate a report of the Secretary of State with various documents.<sup>6</sup> On March 1, 1881, Mr. Morgan, from the Committee on Foreign Relations, reported to the effect that "Congress should not interfere to discuss or decide a question which, for the present, at least, should be open to the consideration of the executive branch or of the treaty-making power."<sup>7</sup> On the 14th of the preceding month Mr. Herndon, from the Committee on Foreign Affairs, reported a bill to authorize the Secretary of the Treasury to pay the claims for interest.<sup>8</sup> Further papers on the subject were communicated by President Arthur to the Senate April 18, 1884.<sup>9</sup>

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<sup>1</sup> *United States v. Ferreira*, 13 Howard, 40.

Case of Robert Harrison, S. Mis. Doc. 45, 34 Cong. 3 sess.

3 Op. 677; 4 Op. 286; 5 Op. 333; 6 Op. 533.

<sup>4</sup> March 8, 1871, S. Ex. Doc. 205, 46 Cong. 2 sess.

<sup>5</sup> S. Ex. Doc. 101, 46 Cong. 2 sess.

<sup>6</sup> S. Ex. Doc. 205, 46 Cong. 2 sess.

<sup>7</sup> S. Rep. 922, 46 Cong. 3 sess.

<sup>8</sup> H. Report. 227, 46 Cong. 3 sess.

<sup>9</sup> S. Ex. Doc. 158, 48 Cong. 1 sess.





## CHAPTER E.

### THE VAN NESS CONVENTION.

**New Claims Against Spain.** After the comprehensive settlement between the United States and Spain by the treaty of 1819, claims against the latter government continued to arise in consequence of the war between Spain and her American colonies. Indeed, on the 3d of March 1819, ten days after the conclusion of the treaty, the President approved an act of Congress which was passed with particular reference to the privateers that then scoured the seas, some in the name of Spain and others in the name of her enemies, depredating on neutral commerce. By this act the President was authorized to employ the public armed vessels of the United States "in protecting the merchant vessels of the United States and their crews from piratical aggressions and depredations."<sup>1</sup>

Subsequently certain decrees were issued by the **Decrees of Blockade.** Spanish commanders which neutral powers deemed objectionable. On the 6th of June 1821 Field Marshal La Torre gave notice that all the ports and coasts of the provinces of Maracaibo, Coro, and Barcelona would be considered as under blockade;<sup>2</sup> and in 1822 General Morales declared a blockade of the ports of Terra Firma, embracing the coasts of the mainland bordering on the Spanish Main. According to the report of an American naval officer the Spanish naval forces in those seas consisted at the time of a 44-ton frigate, a brig, and a schooner, which were employed in furnishing supplies to Porto Cabello. As it was impossible with these vessels, even if they had not been otherwise employed, to blockade a coast 1,200 miles in extent, privateers were fitted out at Porto Rico to capture ships sailing to and from the interdicted ports. The proceedings of these privateers, as well as of the tribunals before which they brought their captures, gave rise to numerous complaints and protests.<sup>3</sup> Nevertheless, that these measures did not suffice to break up the prohibited intercourse is shown by the fact that on September 15, 1822, General Morales issued at Maracaibo a new decree, leveled against foreigners entering the ports of the Spanish Main in spite of the blockade, and declaring that they should, if found to be implicated in the rebellion, suffer death, while, if merely found in the country possessed by the enemy, they would be punishable with hard labor for three

<sup>1</sup> 3 Stats. at L. 510.

<sup>2</sup> Br. and For. State Papers, X. 944.

<sup>3</sup> Br. and For. State Papers, IX. 982, 987, 999.

years and confiscation of their property. By a royal order of December 22, 1822, Morales was directed to revoke this decree, which he did on the 8th of the ensuing February.<sup>1</sup>

The measures of the Spanish commanders, though in form decrees of blockade, were hardly defended as such by the Spanish Government. The argument of blockade, which was blended in the defense of General Morillo's decrees of 1815 and 1816, was now practically abandoned. In a note to Mr. Adams of November 11, 1822, Mr. Anduaga, the Spanish minister at Washington, maintained that Spain, so long as she refused to recognize the self-styled governments of Spanish America and continued the effort to bring them back to their duty, might employ for that purpose all the means allowed by her laws and previously respected by other nations. "What," he inquired, "did those laws prescribe before the insurrection? The entire prohibition of all foreign commerce in the Spanish provinces of America."<sup>2</sup>

Great Britain demanded redress for the injuries to British property, and ordered her naval forces to make reprisals on Spanish property.<sup>3</sup> On March 12, 1823, however, she concluded with Spain at Madrid a convention, which provided for a claims commission to sit in London, and to consist of two members from each nation. If any difference arose on which they were equally divided, it was to be referred to the Spanish envoy in London and a law officer of the Crown; and if they could not agree, to one of them to be determined by lot.<sup>4</sup> It is not strange that "great and almost insuperable difficulties presented themselves in respect to carrying this convention into effect;" and on October 28, 1828, a new convention was signed by which Spain agreed to make good the sum of £900,000 in specie in full of the English claims registered by the mixed commission, and Great Britain agreed to make good the sum of £200,000 for the Spanish claims similarly registered. The payments by Spain were to be made in redeemable inscriptions.<sup>5</sup>

In April 1823 Mr. Nelson, then appointed minister of the United States to Spain, was instructed to press the American claims. In January 1824, immediately after his arrival at Madrid, he presented the subject to the Spanish Government; but as there was no information in regard to the claims at Madrid, the Spanish Government instructed the authorities at Havana to report upon them. In April 1825 Mr. Alexander Everett, who had been appointed to succeed Mr. Nelson, was instructed to continue the negotiations. He proposed a convention similar to that which Spain concluded with Great Britain in 1823, but the Spanish Government declined the proposal on

<sup>1</sup> Br. and For. State Papers, X. 938. In revoking the decree General Morales published a law of the Cortes of June 27, 1821, inviting immigration to South America. See a decree of the Cortes of January 22, 1822, in relation to trade with Cuba. (Br. and For. State Papers, X. 865.)

<sup>2</sup> Br. and For. State Papers, IX. 784, 788.

<sup>3</sup> Br. and For. State Papers, IX. 897.

<sup>4</sup> Br. and For. State Papers, XI. 44.

<sup>5</sup> Br. and For. State Papers, XV. 900.

the ground that the convention was extorted from her during the brief reign of a faction, and was unjust.<sup>1</sup>

Mission of Mr. Van  
Ness.

October 2, 1829, Mr. Van Buren, then Secretary of State, instructed Mr. C. P. Van Ness, who had been appointed minister to Spain, to endeavor to secure the payment of a gross sum, and if he should be unable to do so, to endeavor to arrange for a mixed commission.<sup>2</sup> In the following May Mr. Van Ness took up the negotiations on these lines, and made a general presentation of the claims.<sup>3</sup>

The Spanish minister of state, denying the liability of Spain, maintained:

1. That the "unsupported blockades" of General Morales were to be considered not as blockades in the ordinary sense, but merely as a mode which that commander and others, left as they were to themselves and harassed by the enemy, adopted for the purpose of intimating to foreign nations that the laws relating to the Indies, prohibiting trade with the colonies, were in full force. He contended that the royal order of December 22, 1822, by which the blockade of General Morales was revoked, was not an admission that the measure was illegal; that the concession of trade with the colonies began on the 9th of February 1824, when the royal decree to that effect was issued; and that the armistice between Generals Morillo and Bolivar in 1820 was not a recognition of the independence of the territory occupied by the latter and did not admit free trade with such territory. As to the blockade of the Spanish Main, Spain could recognize no responsibility. The United States had recognized the independence of Colombia, and the King could not consent to be prosecuted as King of the Spanish Main by a government which no longer recognized him as the sovereign of it.

2. That the convention of 1823 with Great Britain could not be recognized as a precedent.

3. That though Spain had not resorted to recriminations, nor reverted to the charge that citizens of the United States had added fuel to the insurrection in Spanish America, it was notorious that as early as 1806 the traitor Miranda found protection, troops, and resources in New York for the purpose of revolutionizing Venezuela. Were not privateers fitted out and manned in the United States? Was it possible to estimate the losses of Spain from the early recognition or the approbation, encouragement, and support of the Spanish American insurgents in the United States?

While declining on these grounds to recognize the claims "*en masse*," the minister of state expressed his readiness to consider on the merits any claim of an American citizen against the Government of Spain for injuries done by Spanish cruisers, or for the unlawful detention of property by the Spanish authorities.<sup>4</sup> Though this expression was scarcely considered reconcilable

<sup>1</sup> S. Ex. Doc. 147, 23 Cong. 2 sess.; Br. and For. State Papers, XVIII. 2.

<sup>2</sup> S. Ex. Doc. 147, 23 Cong. 2 sess.

<sup>3</sup> Mr. Van Ness to the Spanish minister of state, May 8, 1830, S. Ex. Doc. 147, 23 Cong. 2 sess.

<sup>4</sup> S. Ex. Doc. 147, 23 Cong. 2 sess.

with the refusal to entertain the claims as a whole, since most of them were founded on injuries done by Spanish cruisers and the detention of property by Spanish authorities on various pretexts deemed to be illegal, the United States interpreted it as an offer of a basis of negotiation; and Mr. Van Ness was instructed accordingly.<sup>1</sup> Moreover, the admission that the blockades were "unsupported" did not escape notice as an indication that the Spanish Government was disposed to discuss the claims on legal grounds.

But, owing in the main to official changes in the Appointment of Mr. Zea. Spanish Government, and especially to the death of the minister of state, another year elapsed before anything substantial was accomplished. In October 1832, however, after at least two persons had conducted the office in an *ad interim* capacity, Don Francisco de Zea Bermudez, then Spanish minister in London, was appointed minister for foreign affairs. He arrived at Madrid on the 28th of November, and entered on the duties of his office on the 29th. On the 30th he received the foreign ministers, and, in speaking to Mr. Van Ness, himself introduced the subject of the claims. A special messenger from the United States was then waiting at Madrid to receive the final answer of the Spanish Government.

In December 1832 Mr. Van Ness, in a note to Mr. Zea, set forth the claims of the United States, thus:

"These claims have arisen as follows:

"First. From captures and condemnations of vessels and their cargoes, the property of citizens of the United States, by the agents of Spain, in cases where the seizures were not only without foundation, but where the proceedings to obtain condemnations were wholly irregular and void.

"Second. From the improper conduct or neglect of the civil, military, or judicial authorities, in cases in which vessels and their cargoes illegally captured were acquitted, but in which the property had been delivered to the captors, either without security or upon such as was notoriously incompetent.

"Third. From seizures of property belonging to citizens of the United States by the commanding officers of the Spanish army in Peru, for the use of the army.

"Fourth. From the illegal conduct of Spanish agents in regard to American vessels and their cargoes arriving in Spanish ports, as well as in regard to the persons and property of American citizens permanently or temporarily residing within the Spanish dominions.

"Fifth. From the omission on the part of the Spanish Government to furnish documents, properly applied for, to substantiate claims according to the stipulations of the treaty with Florida.

"The nominal amount of these claims is about two million five hundred thousand dollars, exclusive of interest, and they may be settled in either of the two following modes, as shall be preferred on the part of Spain."

Having thus described the claims, Mr. Van Ness proposed the following modes of settlement:

"First. By a convention for the establishment of a mixed commission, to meet at Washington, with authority to examine and decide upon the mutual claims of the parties, and to strike the balance, which shall be paid by the debtor party within one year after the close of the commission. Or,

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<sup>1</sup> Mr. Livingston, Sec. of State, to Mr. Van Ness, October 17, 1831, S. Ex. Doc. 147, 23 Cong. 2 sess.

"Second. By a convention stipulating for the payment of a gross sum as the balance to the United States; the amount to be paid in five annual installments, the first of which, if it should be desired by this government, to be delayed until two years after the signing of the convention, and all bearing an interest of 4 per cent per annum, the payments to be made at Paris or London."

In January 1833 Don José de Heredia, formerly minister to the United States, was appointed to confer with Mr. Van Ness. They discussed the subject of a gross sum, but were unable to agree. On May 18 Mr. Zea wrote to Mr. Van Ness, offering "the sum of \$500,000, or 10,000,000 of reals, to be paid at once in inscriptions of an equal value on the great book of the consolidated debt of Spain, bearing an interest of 5 per cent," in full payment of all claims of the United States from the year 1819 to the day of ratification of the convention. On May 24 Mr. Van Ness replied that this was in effect an offer to pay the sum proposed in the 5 per cent stock of the Spanish Government, which was then worth 50 per cent in Madrid. In Paris, if the interest was payable there, it was worth 76 per cent, at which rate the offer amounted to about \$380,000. Mr. Van Ness also referred to the terms granted to Great Britain by the convention of 1828, by which the stock issued by Spain in payment of the British claims was made redeemable at 55 for the first four years, and at 60 after that period. In the form annexed to the treaty with Great Britain, the inscriptions were described as "*Consolidated Annuities (Renta Anual Consolidada)*, payable in London, inscribed on the great book of the consolidated debt of Spain;" and, in the last clause, it was declared: "The Spanish Government reserves to itself the right of redeeming this debenture, by payment in London, during the four years succeeding the date hereof, at the rate of 55 per cent, or, at any subsequent period, at the rate of 60 per cent on the nominal amount, giving, in either case, six months' notice in the London Gazette."<sup>1</sup> On June 6 Mr. Zea, while deprecating the allusion to the English debt, raised his offer to \$600,000, but declined to alter the terms of payment.

When Mr. Van Ness's report of these negotiations was received, Mr. McLane, then Secretary of State, replied that the President was willing to receive \$600,000 as compensation for the claims, and to receive it in Spanish stock, if such an amount were obtained as would realize that sum. If, however, after full and proper exertions, such a settlement seemed hopeless, Mr. Van Ness was instructed that he might finally accept the "six hundred thousand dollars in inscriptions of stock, upon the terms offered by Mr. Bermudez, it being understood that the interest will be payable in Paris." And it would be proper in any event, said Mr. McLane, "to endeavor to fix upon some definite period for the reimbursement at Paris or even at Madrid" of such amount of the stock as Spain might ultimately agree to give—a promise that would augment its market value; and he suggested for the purpose a term of ten or fifteen years. A definite period of payment was not, however, said Mr. McLane, to be absolutely insisted upon, so as to endanger the success of the negotiation in other respects.

<sup>1</sup> Br. and For. State Papers, XV. 900, 907.

On the receipt of these instructions, Van Ness had several interviews with Mr. Zea; but owing to the death of the King, from whom he had hoped ultimately to obtain a larger sum, Mr. Van Ness had determined to accept the offer that had already been made. Nevertheless, on the 30th of November, as a final effort, he wrote to Mr. Zea, asking for better terms and inquiring whether the Queen Regent would consent "to make the stock which had been offered in payment redeemable at certain fixed periods," say ten or fifteen years. On the 20th of December Mr. Zea replied that the Queen, being obliged to abide by the decision of her deceased spouse on the subject, could not depart from the proposition made on the 9th of June. "Her Majesty," said Mr. Zea, "can neither augment the offer of twelve millions of reals vellon in inscriptions at five per cent interest on the great book of the consolidated debt of Spain, nor make them redeemable within any fixed time." A misunderstanding arose as to the place of payment of the interest, but it was finally decided that it should be Paris.<sup>1</sup> And in order to give the inscriptions a currency beyond ordinary inscriptions, Mr. Van Ness secured the insertion in them of the statement that they were issued in pursuance of a convention with the United States.

On these terms Mr. Van Ness signed with Mr. Hederia, February 17, 1834, a convention, by which the contracting parties renounced, released, and canceled all claims which either might have upon the other, of whatever class, denomination, or origin they might be, from the 22d of February 1819 till the date of signature.

By Article I. of the convention the Government of the United States undertook to distribute the inscriptions, or the proceeds of them, among the claimants entitled thereto, in such manner as it might deem just and equitable. In order to perform this obligation Congress, by an act of June 7, 1836,<sup>2</sup> authorized the President to appoint one commissioner, a secretary versed in English and Spanish, and a clerk, at salaries, respectively, of \$3,500, \$2,000, and \$1,500 a year. This act directed that the inscriptions should be deposited in the United States legation at Paris till the President should otherwise order; and the Secretary of the Treasury was authorized to cause moneys paid from time to time under the convention to be received and accounted for at Paris, and then remitted to the United States and deposited in the Treasury. The Secretary of the Treasury was also authorized to distribute in ratable proportions among persons in whose favor awards were made any money received into the Treasury under the act, and to cause certificates to be made to awardees showing the proportions to which they were entitled.

June 29, 1836, the President appointed, by and with the advice and consent of the Senate, Louis D. Henry, of North Carolina, as commissioner; John J. Mumford, of New York, as secretary; and Cornelius Van Ness, of the District of Columbia, as clerk.<sup>3</sup> On July 30, 1836, they all met in Washington

<sup>1</sup> S. Ex. Doc. 147, 23 Cong. 2 sess.

<sup>2</sup> 5 Stats. at L. 34.

<sup>3</sup> In January 1837 Mr. Van Ness was succeeded as clerk by William A. Weaver.

and took an oath before a justice of the peace well and faithfully to perform the duties of their respective offices. The board having thus qualified, Mr. Henry informed Mr. Forsyth, then Secretary of State, of his readiness to receive communications; and in reply, Mr. Forsyth sent him the journals of the commission under Article XI. of the treaty of 1819 for inspection.

Mr. Henry then adopted the following rules, evidently based on those of the earlier commission:

**Rules of Procedure.**

*"Ordered,* That all persons having claims under the Convention between the United States and Spain, concluded at Madrid on the 17th day of February 1834, which are to be received by the Board, do file a memorial of the same with the Secretary of this Board, to the end that they may hereafter be duly examined, and the validity and the amount thereof be decided upon according to the merits of the several cases, and the suitable and authentic testimony concerning them which may be furnished in support thereof. The said memorial must be addressed to this Board; it must set forth minutely and particular the various facts and circumstances whence the right to prefer such claim is derived; it must be verified by the affidavit of the claimant.

*"And,* in order to prevent unnecessary delay, and to expedite the business of this Board, it is further—

*"Ordered,* That all the proof necessary and sufficient to support the claims aforesaid, be filed with the Secretary of the Board at the time of filing the respective memorials thereof, or on or before the first Monday of December next, to which day this Board will adjourn.

*"And* in order that claimants may be informed of what is now considered by the Commissioner as essential to be averred and established, before any such memorial can be received by this Board, it is further—

*"Ordered,* That each claimant shall declare, in his said memorial, for, and in behalf of, whom the said claim is preferred, and whether the amount thereof, and of any part thereof, if allowed, does now, and at the time when the said claim arose, did belong solely and absolutely to the said claimant, or to any other, and if any other, what person. And in cases of claims preferred for the benefit of any other than claimant, the memorial to be exhibited must further set forth, when, why, and by what means, and for what consideration, such other has become entitled to the amount, or any part of the amount of said claim.

*"The* memorial required to be exhibited by all claimants must also set forth and certainly declare whether the claimant, as well as any other for whose benefit the claim is preferred, is now, and at the time when the said claim arose, was, a citizen of the United States of America; where he is now, and at the time when the said claim arose, was domiciliated, and if any, what change of domiciliation has since taken place.

*"The* said memorial must also set forth whether the claimant, or any other who may have been at any time entitled to the amount claimed, or any part thereof, hath ever received any, and if any, what sum of money, or other equivalent or indemnification, by way of insurance or otherwise, for loss or injury sustained, satisfaction for which is therein asked; and if any such payment or indemnification has been made, to set forth when and from whom the same was received. And that time may be allowed to claimants to prepare and file the memorials above mentioned, and the necessary proof, it is further

*"Ordered,* That when the Board shall close its present session, it adjourn to meet again on the first Monday of December next, at which time it will proceed to decide whether the memorials filed with the Secretary are in conformity to the foregoing Orders, and to pass upon the proof and validity of such of them as may be found in conformity to these orders.

*"Ordered,* That the Secretary of this Board do cause three hundred copies of the above orders to be printed for the use of the claimants; and also that the publishers of the Laws of the United States, at Washington; Portland, in Maine; Portsmouth, in New Hampshire; Boston, in Massachusetts; Providence, in Rhode Island; Hartford, in Connecticut; New

York, in the State of New York; Philadelphia, in Pennsylvania; Baltimore, in Maryland; Richmond, in Virginia; Raleigh, in North Carolina; Savannah, in Georgia; New Orleans, in Louisiana; and also the *National Intelligencer*, in Washington, and the *Commercial Advertiser*, in Salem, Massachusetts, be requested to publish this notice three times a week for six consecutive weeks, and three times in the first week of November next."

On the 3d of August an order was made, authorizing the secretary to permit claimants or their agents to examine and, if needful, copy any paper in his possession; but it was provided that no paper should be taken or copied out of the office of the commission.

The board held four sessions. The first session lasted Sessions of the Board. from July 30 to August 3, 1836, when an adjournment was taken till the first Monday in December in order that claimants might have an opportunity to file memorials. On December 6, the day appointed, the board met again, and the commissioner extended the time for filing, amending, and verifying memorials till February 1, 1837.

Early in January 1837 the commissioner addressed to the Secretary of State the following letters:

"OFFICE OF THE COMMISSIONER UNDER  
"THE CONVENTION WITH SPAIN,  
"Washington, January 4, 1837.

"SIR: At the time of my acceptance of the office of commissioner under the convention between the United States and Spain, I was induced to believe that its duties could be discharged within the period fixed by Congress; but such is the variety, voluminousness, and intricacy of the cases already presented, that I am persuaded it is beyond both my physical and mental ability to bring the commission to a satisfactory close within the period prescribed. This inability, instead of being diminished, will probably be augmented by the addition of more and larger claims upon the fund; indeed, the information on this subject now in my possession reduces my apprehension to certainty. It may have been and doubtless was, supposed by many that the amount of the fund gave sure indication of the nature and number of the claims; but this is wide of the fact, since in amount they already far exceed the fund, and in number and complexity surpass any estimate I have seen.

"In conclusion, so positive am I of the insuperable impediments to which I have adverted, that you will do me a favor by an early communication to the President of my earnest wish that the time may be extended by Congress, or some other person joined with me in the commission.

"I am, sir, with great respect,

"LOUIS D. HENRY."

"To the Hon. JOHN FORSYTH,  
"Secretary of State."¹

"OFFICE OF THE COMMISSIONER UNDER  
"THE CONVENTION WITH SPAIN,  
"Washington, January 6, 1837.

"SIR: Referring to the communication I had the honor of addressing to you on the 4th instant, it may be proper to add, for the information of the President, that of fifty-five memorials already presented I have suspended twelve, on account of various informalities and want of conformity to the orders adopted and officially published on the 30th of July last; rejected three, as evidently possessing no claim upon the fund; and allowed

¹ H. Ex. Doc. 73, 24 Cong. 2 sess.



one to be withdrawn by the memorialist. Many other claimants having solicited an extension of the time assigned for the presentation of memorials, on the allegation of their utter inability otherwise to procure from foreign countries indispensable documents, the order of July was, at their instance, modified by the extension of the time to the 1st of February next; but the order is in force in reference to all others.

"In several of the suspended cases, also, the claimants can not procure the requisite documents in time to enable me to pass upon them equitably; indeed, there is not a single instance in which the claimant has signified his willingness to have his case set down for hearing; some of the claimants require time to procure evidence from England, France, Spain, South America, and the West Indies.

"The amount of claims presented thus far, by memorial, exceeds the fund, and the amount of claims of which notice has been given, and part of the proofs in support of which are now on file in this office, reaches several millions beyond the fund. It is out of my power to decide upon the validity of the mass of these claims, until not only the memorials shall have been filed, but all the proofs before me.

"The reason for the suspension of most of the memorials has been the insufficiency of the accompanying evidence by which the claims were supported; and I do not doubt that, on reasonable indulgence being given as to time, the necessary proofs will be furnished. It strikes me to be premature to express a confident opinion as to what range the claims may take under the convention; certain it is, that much of the embarrassment now felt by me on this point will be removed should the President recommend, and Congress adopt, either of the alternatives proposed in my note of the 4th instant to the department.

"With great respect, I remain, sir, your most obedient servant,

"LOUIS D. HENRY."

"Hon. JOHN FORSYTH,  
"Secretary of State."

These letters were duly communicated to Congress, and the term of the commission, which was at first limited to a year from the first meeting in Washington, was extended till February 1, 1838.<sup>1</sup>

February 8, 1837, the board adjourned till May 22, Principles of Decision. when it reconvened for its third session. This session closed July 12, when an adjournment was taken to November 23, to afford claimants further time for filing memorials and proofs. On July 10, two days before this adjournment, the commissioner published the following principles and rules on which all accounts were to be taken, under decisions allowing claims:

"First. As to vessels: The value of every vessel must be estimated at her actual cost to the owner, where that can be ascertained; and if not ascertained, her value at the commencement of the voyage will be deemed to be her true value, deducting therefrom a reasonable percentage for subsequent deterioration.

"To her value thus allowed, add two-thirds of a fair freight, where the voyage was not completed.

"In cases of capture and release, where doubts exist as to the probable grounds of capture, nothing is to be allowed for the detention of the vessel after capture, unless the delay has been unreasonable, and then only for the wages of the crew—expenses of their support—and damages incurred by the vessel during the detention.

"Second. As to cargo: In cases where the cargo has been taken at sea, the invoice cost will be deemed to be its true value, adding thereto the usual and ordinary shipping charges—the customary brokerage on the purchase

<sup>1</sup> H. Ex. Doc. 73, 24 Cong. 2 sess.

<sup>2</sup> Act of June 7, 1837, 5 Stats. at L. 179.

of the goods—and a reasonable or fair premium of insurance for the particular voyage, said premium to be rated with that usual or current at the time of the shipment; and this premium is to be allowed whether the owner was his own insurer or not.

"Where the property was *seized on shore* at the place of destination, and the market price there, at the time of seizure, can be satisfactorily ascertained, that price shall be the criterion of value. If from any cause such market price cannot be ascertained, recourse must be had to the actual cost and charges as in other cases.

"Third. Charges and expenses, in defending the property, whether vessel or cargo, will be allowed where they have been *actually paid*, in all cases where there has been a reasonable effort to defend or reclaim the subject.

"Fourth. Where the property was recaptured, and restored on payment of salvage, the amount so paid, with incidental expenses, is to be allowed. In cases of *Ransom*, the actual sum paid is to be allowed, and where the property has been sold after capture, and a proportion of its proceeds given up as the price of a partial restitution, the sum so given up is to be deducted from the indemnity to be allowed.

"Fifth. As to freight: A fair premium of insurance is to be allowed on freight, as on other insurable interests.

"Sixth. In the distribution of the amount awarded, reference is to be had only to the claimant's *actual loss*. Nothing is to be allowed for profits or anticipated gains. Whatever he has received under contracts of insurance, is to be deducted from the award in his favor; but where insurers are claimants, their claims are generally to be allowed for the sums *actually paid*, except in cases of loss especially adjusted between the parties, and then the intention of the parties at the time of settling their contracts is to be carried into effect."

November 23 the board met for its fourth session, which continued till January 31, 1838, when the term of its existence being about to expire, the board, having disposed of the business before it, directed the secretary to transmit all books, papers, and documents relating to the commission to the Department of State, and then adjourned. The commissioner made the following report:

"The undersigned commissioner, a citizen of the United States, appointed by the President, by and with the advice and consent of the Senate, under the act of Congress approved the 7th of June 1836, entitled 'An act to carry into effect a Convention between the United States and Spain, concluded at Madrid, on the 17th day of February, A. D. 1834,' has the honor to submit to the Secretary of State the following Report.

"The board was duly organized pursuant to the said act, on the 30th of July 1836. The journal, or record, of its proceedings, which accompanies this report, will show fully the manner in which it was organized, and the various orders, rules, and regulations, which it adopted from time to time, for the just and orderly government of its proceedings, to which the commissioner begs leave to refer.

"The action of the undersigned upon the cases submitted to his consideration, comprehended three stages. The *first* stage was the examination of memorials; the *second*, the examination of the proofs filed to substantiate the allegations of the memorials; and the *third*, and last, was the adjustment of the awards in the allowed cases. In this order he therefore begs leave to present a general outline of the principles which regulated his determinations.

"In the examination of memorials, the facts stated therein, and verified by the affidavit of the claimant, were assumed by him to be true. If the case presented by the memorial was embraced by the renunciations of the third article of the convention of the 17th February 1834, unless a strong doubt existed, the memorial was received; otherwise, it was rejected.

"This course involved the necessity of settling the proper construction

of that article, as to what claims were to be considered as comprehended within its renunciations.

"By the third article, Spain and the United States reciprocally renounce *all claims* which either may have upon the other, of *whatever class, denomination or origin*, they may be, from the 22d February 1819 until the time of signing the convention. No enumeration of these claims is afforded by the treaty. Language thus broad and comprehensive admitted of the greatest latitude of interpretation, and admonished the undersigned of the high responsibility involved in affixing to it a legitimate construction.

"This question occasioned to him the most serious embarrassment, as upon its right determination must depend the fact whether the fund obtained under the convention from Spain should prove available or delusive as an indemnity to rightful claimants, or be frittered away among the mass of illegitimate pretenders.

"That a general error existed in the public mind as to the right construction of the third article was evident to the undersigned, from the very miscellaneous character of the claims preferred for his consideration—presenting every imaginable shade of grievance and injury, whether springing from contracts, spoliations, or the enforcement of Spanish municipal laws. This error no doubt had its foundation in the latitude of phraseology employed in the third article, undefined by any specification of the renunciations it was meant to embrace.

"The undersigned is aware that he must have disappointed the hopes of many confident claimants, in determining, as he did, to place a restrictive interpretation upon this article. On this, however, as upon all other questions of doubt, involving principles of decision, the undersigned took as guides to a right judgment the laws of nations, the stipulations of treaties between the United States and Spain, and the correspondence between the two governments, which led to the conclusion of the convention, as far as they were applicable to the cases before him, and never permitted himself to range in the wide field of unrestricted opinion. This course was dictated not only by a just distrust of his own judgment, but by the more important consideration, that he was unaided by the arguments of counsel, or by the cooperation of an assistant commissioner, and that there was no appeal from his decisions.

"The construction adopted by the undersigned restricted the broad language of the third article to the recognition of such cases only, as would have formed valid reclamations against Spain, on the part either of the United States or her citizens, had the convention of 17th February 1834 never been concluded.

"To establish, therefore, the validity of a claim, it was necessary to show that the aggrieved party was a citizen of the United States, and entitled to the protection of his government, at the time of the wrong complained of; that the claim had never become the property of a foreigner, by which its national character was considered as forever forfeited; that the wrong complained of was a clear violation of the laws of nations or of treaty stipulations between the United States and Spain; that it was authorized by Spain, or directly sanctioned by her authorities, civil, military, or judicial; that the injury was not the loss of *expected gains*, and that the claim remained in full force against Spain at the date of the convention of the 17th of February 1834.

"Under this construction a class of claims was admitted which deserves a particular notice, not only on account of the principles involved, but on account of the magnitude of the claims themselves.

"These were claims which had their origin before the 22d February 1819, the date of the Florida treaty, and were included within some of the renunciations of the ninth article of the said treaty—where it appeared the claimants had *preferred* their claims before the board organized under the said treaty; that they were in want of documents, which were in the possession of Spain, *indispensable* to establish their claims before said board; had made proper application, in the mode designated by the said treaty, to obtain said documents, but had failed to obtain them owing to the omission of Spain to furnish them within the time prescribed for the action of the board, in violation of the obligations imposed upon

her by the eleventh article of the Florida treaty, whereby the claims were disallowed by the commissioners acting under that treaty.

"The renunciations of the convention of the 17th February 1834, it is true, are limited to cases since the 22d February 1819, and the claims in question were renounced by the United States, by the ninth article of the Florida treaty. But as Spain obligated herself to the United States, by the eleventh article of that treaty, to furnish the documents and elucidations, when properly demanded, which should be necessary for the adjustment of these claims by the Florida board, the failure on her part to furnish them, whereby the claims were rejected, was considered as constituting a valid reclamation against her on the part of the United States, as trustee *for and in behalf of these very claimants*. The fund obtained under the convention of February 1834 was given by Spain in part to remunerate the losses occasioned by her breach of the eleventh article of that treaty. These claimants were the aggrieved parties, and, to the extent of their losses, the equitable owners of said fund. The right of reclamation for this breach accrued to the United States since the 22d of February 1819, and enured to the benefit of these claimants as rightful participants of the fund; so that by adopting the construction referred to, the language of the third article of the convention, which confined its renunciations to a designated period of time, was reconciled with the justice and equity of the claims themselves. This opinion, moreover, was fortified by the correspondence between the two governments, which induced this convention, by which it will appear that the United States preferred this class of claims to Spain for indemnification, and enforced her demands with a confidence of manner which attested the sincerity of her motives and the justice of the claim.

"While, however, this class of claims was recognized as embraced by the third article of the convention, it was held that, to entitle them to be allowed, they must possess the following qualifications, viz.: That the claimant had submitted his claim, in the proper manner, to the Florida board; that it was disallowed for the want of documents and elucidations which were in the possession of Spain, and which were indispensably necessary to establish its validity; that a specific application had been made to obtain them, through the channel designated by the Florida treaty; and that our government had made a demand upon Spain for them, within a reasonable time before the expiration of the time limited for the sitting of the Florida board; and finally, that it was not only embraced by some of the renunciations of the ninth article of the Florida treaty, but that it was a *good* and *valid* claim under that treaty, and as such ought to have been allowed by the tribunal which adjudicated claims under the treaty, had the required documents been furnished.

"But few, however, of this class of claims were presented to the undersigned for consideration, and not more than one or two possessed the requisite qualifications to entitle them to a favorable reception.

"The next stage in the progress of the commission was the examination of memorials on their proofs. Each claimant was required to produce the highest evidence, which the nature of his claim admitted, to establish the allegations of his memorial. Where such evidence could not be produced from loss or accident, and from no fault imputable to the claimant, or, where any reasonable effort had been made to procure it, without avail, secondary evidence was admitted with very great caution.

"In every case resting upon the condemnation of Spanish tribunals, the decree of condemnation properly authenticated was considered as indispensable evidence, unless where it indubitably appeared that timely and vigorous efforts had been made to procure it, but without success.

"Although the undersigned recognized the principle of public law as well established, that the captor's nation is not to be held responsible but for the decisions of its highest tribunals, appointed to investigate questions of prize of war, yet when it appeared to be the uniform course of the Spanish tribunals of every grade, during the period of time in which the cases arose that came under his consideration, to condemn the property of our citizens as prize of war, upon the most groundless and frivolous pretenses, in contravention of well-established principles of inter-

national law and treaty stipulations applicable to the cases, and in utter disregard of those forms of procedure, adopted by the universal usage of civilized nations, to secure a fair hearing to claimants, and to load an appeal with costs too oppressive to be borne, he did not require the claimant to show that he had prosecuted an appeal from the inferior to the supreme tribunals of Spain, as indispensable to the validity of his claim. Cases did sometimes occur, although rarely, where the proceedings of the Spanish courts were marked by a just regard to the claims of humanity and public law. These exceptions established the propriety, inculcated by the principles of international law, of confiding in the decisions of the legitimate prize tribunals of Spain, where nothing appeared to impugn them for palpable errors of law or fact. But, where it appeared that there had been "a refusal of justice—palpable and manifest injustice, and a gross violation of forms," in cases involving little doubt, those decisions were regarded only as colorable, and the case was thrown open for a full investigation upon its merits.

"The proofs filed with memorials under the same spoliations, were always collated with each other, as well as with any evidence that was furnished from the Department of State; and cases of different spoliations which had their origin about the same period of time, and under similar circumstances, were often compared with each other, with the view of testing the justice of the complaint, and guarding against imposition or mistake.

"Notwithstanding all this precaution, the undersigned cannot flatter himself but that his unaided research has been fraught with a multiplicity of error. His aim has been to do justice and equity where he was not too strongly overruled by the law of the case.

"The undersigned next proceeded to ascertain the amounts due to the respective claimants, whose claims he had allowed as valid. In adjusting the amount to be awarded to each, he adopted as a controlling principle, that the fund obtained by the convention with Spain was intended only as an indemnification for *actual losses sustained*, and not as recompense for the loss of *expected profits or gains*. The rules and principles established for making up the awards will be found recorded fully and at large in the journal of his proceedings, under date of the 10th of July 1837, to which he here begs leave to refer. They were those which had been generally adopted by other successive boards of a like nature, had been reported to the government from time to time, and were supposed to be sanctioned by its acquiescence, as no instance was known to him in which they had been repudiated. That his own judgment did not concur in all these principles he is free to avow, but being avouched by the high authority of so many distinguished jurists, with the implied approbation of the government, they acquired the force of precedents which he did not feel himself at liberty to disregard.

"A brief summary of them will only here be presented.

"As to vessels, their actual cost to the owners was allowed, when it could be ascertained; and where it could not, their value at the commencement of the voyage, deducting a reasonable percentage for subsequent deterioration. The tables of Alexander Stewart, Junior, of Philadelphia, compiled at the instance of the French commission, were generally used to ascertain this deterioration.

"To the value of the vessel was added two-thirds of a fair freight, where the voyage was not completed, with insurance to cover.

"In cases of improper and unreasonable detention, allowance was only made for the wages of the crew, expenses for their support, and damages incurred by the vessel during such detention.

"As to the cargo, the invoice value was taken to be the true value in all cases, save where it was seized *on shore, at the place of destination*, to which was added the usual shipping charges, the customary brokerage on the purchase of the goods, and a reasonable or fair premium of insurance to cover, on the particular voyage. When seized *on shore, at the place of destination*, and the market price could be satisfactorily ascertained, that was allowed, as the true criterion of value; if it could not be ascertained, recourse was had to the actual cost and charges.

"Charges and expenses in defending the property, where reasonable evidence was afforded of *actual payment*, were also allowed. In the distribution of the amounts awarded under each spoliation, the sum which any claimant had received under contracts of insurance was deducted from the gross amount awarded him, and where insurers were claimants they were generally allowed what they had actually paid, except in cases of loss especially adjusted between the parties, and then the intention of the parties at the time of settling the adjustment was carried into effect.

"Having thus stated the general principles by which the undersigned was guided in deciding upon the validity and amount of claims presented for his consideration and the distribution of the awards, he herewith subjoins a descriptive list of the several books prepared under his direction, in which his proceedings have been recorded, and which accompany this report.

"A. Journal of the proceedings of the board.

"B. A list of all the memorials presented, numbered from 1 to 102, and a list of awards.

"C. A list of the several awards made by the undersigned, arranged under the heads of the vessels, which were the subjects of spoliations, or from which the property had been seized, or in which it had been transported.

"D. A book of 'Orders' published for the information of claimants.

"From these it will appear that the number of memorials was one hundred and two; that the number of awards [was 68, there being 34 rejections]; and that the amount awarded to claimants under the rules and principles adopted by the commissioner for adjusting awards is four hundred and sixty-six thousand eight hundred and nine and  $\frac{1}{10}$  Dollars, to which was added by order of the commissioner (see order of 31st January 1838) twenty-eight and a-half percentum, making the total amount awarded to claimants, five hundred and ninety-nine thousand eight hundred and fifty  $\frac{3}{10}$  Dollars.

"Approved.

"LOUIS D. HENRY.

"Attest:

"JOHN J. MUMFORD, *Secretary.*"

Of the 34 claims that were rejected, 5 were disallowed for invalidity, 15 for want of proof, 2 for defective averments, 3 for defective averments and want of proof, 3 for defective averments and invalidity, and 1 for want of proof of citizenship and for defective averments, while 3 were withdrawn. One was rejected for special reasons, as follows:

"No. 102. Ysabel Leonard and John B. Leonard, Executors of John Leonard.

"This memorial was filed on Saturday 27th January 1838, at  $\frac{1}{4}$  past 3 o'clock P. M., being only four working days before the expiration of the Commission. The Memorial was considered and received because, although it was filed at so late a day, the claimants showed *good and sufficient reasons* why it was out of their power to file it *at an earlier day*. The ground upon which the claimants rested their right to a reclamation against Spain was the entire ruin or breaking up of John Leonard's vast commercial establishment in Spain, by the seizure or sequestration of his property, under a Royal Order of the King (which commissioned a special court or Judge to entertain an action in behalf of one Thorndike, against the Testator Leonard, for damages which he (Thorndike) alleged he had suffered at the hands of Leonard, by reason of false and groundless prosecutions instigated against him by Leonard), in contravention of the 7th article of the Treaty of 1795.

"The proofs in this case were voluminous but yet imperfect, owing no doubt to the confusion into which Mr. L.'s papers were thrown by his death. This circumstance, together with the want of time at the closing hours of the Commission duly to consider the various and intricate questions connected with the investigation of the claim, have prevented the

Commissioner from forming as confident an opinion as was desirable, upon the merits of the case. He had only time to record this brief memorandum of the reasons for disallowing the claim. The principal questions to be determined were, whether it were competent for the King of Spain to appoint a special tribunal to adjudicate a controversy between two citizens of the United States, notwithstanding the 7th and 20th articles of the Treaty of 1795. Next, if it appeared that the King had done so, at the instance of the Minister of the United States, then resident near his Court, whether the United States were not estopped from setting up any plea against the jurisdiction of the court, and of course from making any reclamation against Spain on that account. And lastly, whether the proceedings of this court had been duly conducted under the authority of law and according to its due course, in the same way that justice would have been dispensed between citizens of Spain.

"Being of opinion from the evidence submitted to him that this court had been appointed at the special request of the Minister of the United States, and therefore that our Government could not impugn its legality, the Commissioner could not, for this reason, consider that this claim would have been valid against Spain. If, however, the Spanish tribunal were duly constituted, and Mr. Leonard aggrieved by its proceedings, yet, as his representatives have not furnished an exemplification of its whole proceedings and decrees, in the suit between Thorndike and Leonard, to enable the Commissioner to pronounce upon their regularity and legality, the Claim must be considered as invalid under the convention of 17th February 1834. The claim is therefore disallowed.

"Jany. 31, 1838."

**Payments on the  
Awards.**

While the bill to carry the convention into effect was pending before the House of Representatives, Mr.

Cushing said "that he desired to avail himself of this

occasion to express his strong sense of the justice and honor exhibited by the Government of Spain in the treaty of which this bill was the consummation. In the midst of national calamities, which she met with her characteristic fortitude, with a deadly civil war raging in her bosom, and weighed down with financial embarrassments, Spain has acknowledged and satisfied the claims of our citizens, in a spirit of manly promptitude and frankness, in striking contrast with the conduct of some other European powers in similar matters." "The long continuance of the internal condition described by Mr. Cushing caused a suspension of payments due under this treaty. In his message to Congress of December 7, 1841, President Tyler said: 'The failure on the part of Spain to pay with punctuality the interest due under the convention of 1834, for the settlement of claims between the two countries, had made it the duty of the Executive to call the particular attention of that government to the subject. A disposition has been manifested by it, which is believed to be entirely sincere, to fulfil its obligations in this respect so soon as its internal condition and the state of its finances will permit.'

"Mr. Buchanan, when Secretary of State, agreed to receive an annual payment of \$30,000 at Havana in full of the interest on the principal provided for by the convention, less fifteen hundred dollars for what was called prompt payment. \* \* \* When the payment of 1862 was about to be made, the question arose whether it should be demanded in coin or whether we were bound by the act of Congress of the 25th of February 1862 to accept the same in the currency of the United States. The latter alternative was reluctantly acceded to.'"<sup>1</sup>

<sup>1</sup>Davis's Notes: Treaties and Conventions between the United States and other Powers, 1776-1887, p. 1367.





## CHAPTER F.

### THE DANISH INDEMNITY: CONVENTION OF MARCH 28, 1830.

Though diplomatic relations between the United States and Denmark were early established, the first treaty entered into between the two countries was that of friendship, commerce, and navigation, which was concluded at Washington on the 26th of April 1826. On the day preceding its signature Mr. Clay, who was then Secretary of State, addressed to Mr. Pedersen, the minister resident of Denmark at Washington, with whom the negotiations had been conducted, a note in which he stated that "it would have been satisfactory to the Government of the United States if Mr. Pedersen had been charged with instructions, in the negotiation which has just terminated, to treat of the indemnities to citizens of the United States in consequence of the seizure, detention, and condemnation of their property in the ports of His Danish Majesty. But," continued Mr. Clay, "as he has no instructions to that effect, the undersigned is directed, at and before proceeding to the signature of the treaty of friendship, commerce, and navigation on which they have agreed, explicitly to declare that the omission to provide for those indemnities is not hereafter to be interpreted as a waiver or abandonment of them by the Government of the United States, which, on the contrary, is firmly resolved to persevere in the pursuit of them until they shall be finally arranged upon principles of equity and justice. And to guard against any misconception of the fact of the silence of the treaty in the above particular, or of the views of the American Government, the undersigned requests that Mr. Pedersen will transmit this official declaration to the Government of Denmark." Mr. Pedersen acknowledged the receipt of this note and promised to transmit it to his government.<sup>1</sup>

The claims to which this correspondence related had their origin in the Napoleonic wars. On the 14th of September 1807 Denmark, suddenly forced by Great Britain from the position of neutrality from which Napoleon had already prepared to drive her, issued instructions to her privateers to bring in for adjudication not only all British vessels but all vessels which there was ground to suspect of not being neutral.<sup>2</sup> In the latter part of 1809 American merchants, who since the expiration of the embargo laws had eagerly returned to the pursuit of foreign commerce, began to complain of the seizure of their vessels and cargoes by the Danish privateers. As early as July 19, 1809, a memorial was sent from Christiansand to the

<sup>1</sup> Treaty Volume, 234, 235.

<sup>2</sup> Am. State Papers, For. Rel. III. 327.

President of the United States by the masters and supercargoes of American vessels whose voyages had thus been interrupted.<sup>1</sup> In the following October resolutions on the subject were adopted by the merchants of Philadelphia. Between April and October 1809 many American vessels—reports at the time said upward of fifty—were seized and carried into Danish ports, the most of them into Copenhagen and Christiansand, but some into Aulburg and Fladstrand. Out of a list of fifty, twenty-one were condemned, but in some of the cases of acquittal, as well as in some of the cases of condemnation, appeals were taken.<sup>2</sup>

**Privateering Instructions of 1810.**

March 28, 1810, revised instructions to Danish privateers were issued, by one clause of which all vessels were declared to be good prize "which have made use of British convoy either in the Atlantic or the Baltic."<sup>3</sup> Under this clause eighteen American vessels were seized in 1810, and many more were captured in the same year by the Danish privateers on other grounds.

**Remonstrances.**

The first remonstrance on the part of the United States against the Danish seizures was made by John Quincy Adams, who in September 1807, while on his way to Russia as minister of the United States, stopped at Christiansand and there received information of the extensive attacks to which American commerce had already been subjected. Though he was not accredited to the Danish court, he made such representations as were admissible on the subject of the seizures, and then went on to Russia. More than a year and a half elapsed before the United States were represented at the Danish court by a minister.

In May 1811 Mr. George W. Erving arrived in Copenhagen as special minister of the United States. His first act after his arrival was to request that all proceedings in the American prize cases might be suspended till, having been presented to the King, he should be able to enter into regular communication on the subject with Mr. De Rosenkrantz, the minister for foreign affairs; and on the 6th of June he transmitted to Mr. De Rosenkrantz two lists of vessels, one of which embraced twelve vessels, taken in company with a fleet under the convoy of a British gun brig and sent into Christiansand by five Danish men-of-war in July 1810. The other list embraced sixteen vessels against which suits were then pending in the high court of admiralty at Copenhagen, and in two of these cases the sole ground of complaint related to certificates of origin given by French consuls in the United States. It had been the practice of these consuls to grant certificates of origin to American vessels bound to ports in France or in neutral or allied countries. In 1809 the French Government directed them to discontinue granting such certificates except to vessels bound to France. This order was not received in the United States till November 13, 1809, and it was in the interval between its issuance in France and its reception in the United States that the two certificates in question were granted. The King, on being informed of the facts, directed that certificates of origin issued by the French consuls before receiving the order to cease granting them

<sup>1</sup> Am. State Papers, For. Rel. III. 329.

<sup>2</sup> Id. 328-332.

<sup>3</sup> Id. 524.

should not be permitted to work any injury to the vessels. In other respects also His Majesty manifested the rectitude of his intentions, and seizures of American vessels by the Danish privateers were, after Mr. Erving's arrival at Copenhagen, for the most part discontinued.

In a dispatch to Mr. Monroe of June 23, 1811, Mr. Erving stated that the evils which American commerce had suffered in Denmark, though very considerable, were yet not so extensive as had been generally believed. He gave the whole number of captures in 1809 as 38, of which 12 were condemned. In 1810 the number of captures was 122, of which 30 were condemned, including 8 out of 18 convoy cases. Thus the whole number of captures in 1809 and 1810 was 160, and the whole number of condemnations was 42, of which 12 were not genuine American cases. Ninety-four vessels had been released. Twenty-four cases, including the 10 undetermined convoy cases, were still pending in various tribunals. "Finally," said Mr. Erving, "of the 14 cases (not convoy cases) which were pending before the high court on my arrival, 4 have been acquitted. And though the privateeramen and all concerned with them (and the ramifications of their business are immense) have made every effort to bring on condemnations, yet the tribunal, otherwise perhaps well disposed to proceed, has been steadily held back by the government, and I see the best reason to hope that at least 8 of the remaining 10 cases will be acquitted. As to the convoy cases my confidence is not so strong, yet even of them I do not despair. The ground on which they stand, I am aware, is not perfectly solid, yet I did not feel myself authorized to abandon them, and therefore have taken up an argument which may be difficult, but which I shall go as far as possible in maintaining." Mr. Erving further stated that, though Mr. De Rosenkrantz gave him reason to hope for the King's perseverance in the change of system which had so happily taken place, he discouraged "any expectation of indemnification for the injuries sustained by our commerce under that which now appears to be relinquished. Yesterday he told me very explicitly," continued Mr. Erving, "that against the definitive decisions of the high court I must not hope for any redress. He trusted that for the future we should not have any cause to complain, but for the past there was no remedy. I thought it not opportune to enter much into the matter at that time, and therefore contented myself with some general protestations against his doctrines."<sup>1</sup> A week after this dispatch was written Mr. Erving complained to Mr. De Rosenkrantz that the tribunals, in their determination of the American cases, did not give effect to the "just and liberal views" of the King; that the high court "had, in a multiplicity of cases, \* \* \* entered into matters entirely irrelevant to the object of the instructions;" that it had "given weight to evidence entirely inadmissible," and that it had "resorted to pretexts for condemnation entirely insufficient." As an example he pointed to a then recent decision, by which he said that a valuable American ship was condemned on the mere allegation of some of the privateering captors that she had thrown some papers overboard, though her neutrality and that of her voyage were fully established. These representations were made on the 30th of June. On the 2d of July condemnations were pronounced by the high court in 4 of the pending convoy cases. As this

<sup>1</sup> Am. State Papers, For. Rel. III. 521.

action was taken in spite of Mr. Erving's requests for delay, he "warmly remonstrated against this precipitate procedure, and the determination taken to condemn all the convoy cases without admitting any justificatory pleas." The Danish Government, however, maintained "that neutral vessels that make use of the convoy or protection of the vessels of war of Great Britain are to be considered as good prize if the Danish privateers capture them under convoy." Such was the construction given by Mr. De Rosenkrantz to the convoy clause of the instructions of March 28, 1810; a clause which, as thus construed, the Danish Government refused to modify.<sup>1</sup> The principle on which the clause was justified was, as stated by Mr. De Rosenkrantz, "that he who causes himself to be protected, by that act ranges himself on the side of the protector, and thus puts himself in opposition to the enemy of the protector, and evidently renounces the advantages attached to the character of friend to him against whom he seeks the protection. If Denmark should abandon this principle the navigators of all nations would find their account in carrying on the commerce of Great Britain under the protection of British ships of war, without running any risk. We every day see this done, the Danish Government not being able to place in the way of it any obstacles."<sup>2</sup> In contesting this principle the representatives of the United States seem to have been greatly aided by its very literal application by the Danish tribunals, so that the mere fact of being found in the company of vessels under convoy was treated as a sufficient ground for condemnation.

After May 1811 few American vessels were molested by the Danes.<sup>3</sup>

#### Subsequent Negotiations.

In the interval between Mr. Erving's special mission to Copenhagen, which ended in May 1812, and Mr. Clay's correspondence with Mr. Pedersen, no serious effort was made to bring about a settlement of the claims for Danish spoliations, though the subject was not permitted to fall into oblivion. In the autumn of 1818 Mr. George W. Campbell, who had been appointed minister to Russia, stopped on his way at Copenhagen, and in an interview with Mr. De Rosenkrantz stated that although he was not instructed to renew the discussion of the claims at that time, he had it in charge to say that his government, entertaining the strongest conviction of their justice, could not think of abandoning them. In 1825 Mr. Christopher Hughes, jr., who had been transferred as *chargé d'affaires* from Sweden and Norway to the Netherlands, was instructed on his way from Stockholm to The Hague to call at Copenhagen and repeat the demand for satisfaction of the American claims. In the performance of this duty he presented to Count Schimmelmann, then Danish minister for foreign affairs, on the 5th of August a note urging that an indemnity be paid. On the 17th of August Count Schimmelmann replied, again setting up the irreversible character of the sentences of the high court of admiralty. Two days later, however, Mr. Hughes, in a report to his government, stated that the general result of his observations during his short stay of eighteen days at Copenhagen was that there did exist "a disposition to go into an examination of the claims, which the owners of them may perhaps turn to a favorable account—a disposition produced by views and

<sup>1</sup> Am. State Papers, For. Rel. III. 529.

<sup>2</sup> Id. 526.

<sup>3</sup> Id. 535.

calculations of the importance of our trade and of the benefits to be derived from a commercial convention." But he also stated that the owners of the claims "must consent to forget, in a great measure, their justice, and to take up the subject on the more liberal principle of compromise," since there was "neither the will nor the ability to pay the whole."

In 1827, Henry Wheaton was sent to represent the Mr. Wheaton's Mission. United States at the Danish court. His instructions, which were signed by Mr. Clay on the 31st of May, contained an ample review of the subject of claims.<sup>1</sup> As to the mode of their settlement, Mr. Clay said that the President would prefer a board of commissioners similar to that under Article VII. of the Jay Treaty. But if efforts in that direction should be found to be unavailing, Mr. Wheaton was instructed to propose as a compromise the payment of a gross sum, and to invite the Danish Government to state how much it would be willing to pay. Its statement on this subject he was to receive *ad referendum*. It was, however, to be understood that any arrangement arrived at, whether through a board of commissioners or by compromise, was not to be considered as comprehending the claims for the cargoes of the ships *Fair Trader* and *Minerva Smyth*, and the brig *Ariel*, which were detained at Kiel in 1812 and were thought to present peculiar features of injustice; and if a compromise should be made it was to be understood as extinguishing any claims of Danish subjects upon the Government of the United States.<sup>2</sup>

<sup>1</sup>Early in 1827 the subject of claims against France, Naples, Holland, and Denmark, since 1805, was agitated in Congress. On January 30 Mr. Clay, in response to a resolution, sent to the Speaker of the House of Representatives a list of such claims. In this list the claims against Denmark aggregated \$2,662,280.36½. (Am. State Papers, For. Rel. III. 384, 505, 529.) On February 23 Mr. Everett, from the Committee on Foreign Affairs, reported that the committee were confident that executive measures would prove successful in effecting a settlement, and that till such measures had been exhausted and found inadequate, the time for legislative interference would not have arrived. (Am. State Papers, For. Rel. III. 614.)

<sup>2</sup>There were three vessels—the *Mercator*, the *Henry*, and the *Hendrick*—alleged to be the property of Danish subjects, in respect of which claims against the United States arose during the rupture of amity between the United States and France in 1798–1800. The *Mercator* and the *Henry*, appear to have been captured by American armed vessels on suspicion that they were in reality American vessels engaged in violating the nonintercourse with France. The *Mercator*, which was captured on a voyage from St. Thomas to St. Domingo, was said to be the property of a citizen of the former island. (Am. State Papers, For. Rel. III. 344; H. Doc. 249, 22 Cong. 1 sess.) The *Hendrick*, a Danish brigantine, was captured by a French privateer in 1799, and was retaken by an armed vessel of the United States and carried into a British island where she was adjudged to be neutral, but with such an allowance of salvage and costs as absorbed nearly the whole amount of the sales of the vessel and cargo. (Am. State Papers, For. Rel. II. 483.) During the American Revolutionary war the Danish minister for foreign affairs made an application to Franklin, who was then minister of the United States at Paris, for redress in the case of the Danish ship *Providentia*, captured by an armed vessel of the United States. (Wharton's Dip. Cor. Am. Rev. VI. 787.)

On the 26th of July 1828, Mr. Wheaton addressed to Count Schimmelmann a "confidential and private note," in which, after quoting the assurances given by Mr. De Rosenkrantz to Mr. Erving on the 8th of May 1811, that the Danish Government would be disposed to "take into just consideration" the claims of the United States when a general maritime peace should have been restored, he proposed, for the purpose of terminating the claims, a joint commission, or, if that plan should be repugnant to the Danish Government, a settlement of the claims *en bloc*. Soon afterward Mr. Wheaton brought to the notice of Count Schimmelmann the cases of the American ships *Commerce* and *Hector*, which were captured by a Russian squadron in the Mediterranean in 1807 and in respect of which the Emperor of Russia had made reparation, though it seemed that one of the ships had been regularly condemned by a prize court. Great delay, however, was encountered by Mr. Wheaton in having the subject of indemnities brought before the King—a delay partly due to the festivities attending the marriage of the King's daughter. Nevertheless, on the 29th of December, Count Schimmelmann made known the fact that His Majesty, notwithstanding the rule of the Danish monarchy to admit no modification or annulment of a sentence pronounced by the judicial authorities, unless in the case of a pardon, had ordered a report to be submitted to him touching the alleged injuries, in order that he might form a correct judgment on the subject. As the result of this measure, the King in the course of a few days appointed Count Schimmelmann and Mr. De Stemann, the minister of justice, as commissioners with full powers to treat; and the register of prize proceedings and sentences, which had previously been exhibited only confidentially, was opened to Mr. Wheaton's official inspection.

In the summer of 1829 Mr. John Connell, who was agent for a large number of claimants, went to Copenhagen, and Mr. Wheaton was authorized to consult with him in regard to a compromise, and particularly to be guided by him in the settlement of the claims which he represented. The claimants as well as their government had apparently come to the conclusion that the payment of a lump sum offered the best if not the only hope of obtaining an indemnity. Mr. Wheaton had numerous interviews with the members of the Danish cabinet, various informal conferences with Count Schimmelmann, and several official meetings with the Danish commissioners. On the 27th of August 1829 the Danish commissioners offered the sum of 500,000 marks banco of Hamburg, or \$175,000, a mark banco of Hamburg being worth about 35 cents. Mr. Wheaton rejected this offer, and proposed the sum of 3,000,000 marks banco of Hamburg, or \$1,050,000. As the Danish commissioners, in spite of the apparent concessions of the King, reverted to the doctrine that the decisions of their prize courts were conclusive, besides maintaining the objections of their government to a joint commission, this wide divergence of views as to the amount for which claims might be compromised seemed to leave little room for a rational hope that a settlement could be effected. Indeed, Mr. Wheaton informed Count Schimmelmann that he considered the negotiations as substantially terminated. Nevertheless, he determined to place on record a formal exposition of the case of the United States, which should cover all the points in controversy and leave as little occasion as possible for future argument. This he did in a paper of great power, which he presented to the Danish commissioners on the 24th of November,

Mr. Wheaton's  
Argument.

In this paper Mr. Wheaton, after reviewing prior efforts to effect a settlement of the claims, proceeded in the first place to discuss the question of the conclusiveness of the sentences of prize courts. As the basis of this discussion he took the statement of the Danish position made by Count Schimmelmann to Mr. Hughes, in an official note of August 17, 1825. In this statement Count Schimmelmann declared: "The sentences by which vessels, bearing the flag of the United States, have been released or condemned by the prize tribunals or high court of admiralty, are without appeal, and can not, without derogating from that which has been established from the remotest times in the Danish monarchy, be altered or annulled; no more than (might be) sentences pronounced by the courts of justice, and by the tribunals of civil and criminal cases; and the King, during his reign, has followed, in every case, this invariable rule, and has not exercised his supreme power, excepting to mitigate penalties prescribed by sentences, conformably to the laws, or to pardon." Mr. Wheaton combated this statement as proceeding "upon an erroneous conception, both of the nature of prize jurisdiction as established and exercised under the law of nations, and of the demand which has been made by the Government of the United States in respect to the judicial proceedings now in question." It might, said Mr. Wheaton, be "the law of the Danish monarchy that the sentences of the ordinary civil and criminal tribunals, constituted under the municipal code of the country, and exercising jurisdiction over its own subjects, are not reexaminable by the supreme power of the state; but it does not therefore follow that the sentences of the prize tribunals are to have a similar conclusive effect upon foreign states and their citizens." Nor was such an effect to be attributed to those sentences merely because, in the arrangement of the courts of justice of Denmark, the appellate jurisdiction in matters of prize was invested in the same court of last resort as that in cases arising under the municipal law. Though there was a general presumption, which ought not to be lightly disregarded, that the sentences of the ordinary municipal tribunals of a country were correct, yet it did not always prevent a foreigner from invoking the aid of his government to obtain redress for a sentence plainly against right.<sup>1</sup> But even supposing the unjust judgments of municipal tribunals to be conclusive, there was evidently a wide distinction in this respect between an ordinary tribunal proceeding under the municipal law, and the same or another tribunal sitting in a belligerent state and professing to administer the law of nations to foreigners as well as to subjects. "The ordinary municipal tribunals," said Mr. Wheaton, "acquire jurisdiction over the person or property of a foreigner by his consent, either *expressed* by his voluntarily instituting the suit, or implied by the fact of his bringing his person or property within the country. But when the courts of prize exercise their jurisdiction over vessels and cargoes at sea, the property of foreigners is brought by force within the territory of the state by which those tribunals are constituted." The institution of prize tribunals, said Mr. Wheaton, instead of being intended to exempt the sovereign of the belligerent nation from responsibility, was designed to ascertain and fix

<sup>1</sup> Grotius, De Jur. B. ac. P. lib. 3, cap. 2, sec. 5; Bynkershoek, Quæst. Jur. Pub. lib. 1, cap. 24; Vattel, liv. 2, ch. 18, sec. 350.

that responsibility. The sovereign's cruisers were responsible to him alone; and so long as seizures were regularly made, upon apparent grounds of just suspicion, and followed by prompt adjudication in the usual mode, and until the acts of the captors were confirmed by the sovereign in the sentences of the tribunals appointed by him to adjudicate in matters of prize, the neutral had no ground of complaint, and what he suffered was the inevitable result of the belligerent right of capture. But the moment the decision of the tribunal of last resort had been pronounced against the claimant (supposing it not to be warranted by the facts of the case, and the law of nations as applied to those facts), and justice had thus been finally denied, the capture and the condemnation became the acts of the state, for which the sovereign was responsible to the government of the claimant. In the celebrated case of the Silesian loan, the King of Prussia stopped the payment of interest on a loan due to British subjects as an act of reprisal for the unjust condemnation of Prussian vessels by the British prize courts, and an indemnity was paid by the British Government for the condemnations.<sup>1</sup> Under the treaty of 1794 between the United States and Great Britain, a board of commissioners was constituted to determine the claims of citizens of the United States, growing out of the capture and condemnation of their vessels and cargoes under the authority of the British Government. In the course of the proceedings of the board, an objection was made on the part of the British Government to the consideration of any case in which the sentence of condemnation had been affirmed by the lords of appeal in prize causes. This objection was overruled by the board, and the indemnities that were awarded in such cases were promptly paid by the British Government. By the treaty of 1795 between the United States and Spain a similar commission was constituted for the purpose of determining claims on account of captures and condemnations under the authority of Spain, and by this commission the sentences of the Spanish admiralty tribunals were not considered as an obstacle to the decision of the claims "according to the merits of the several cases, and to equity, justice, and the law of nations." Again, provision was made by the Florida treaty for indemnifying citizens of the United States for unlawful seizures by Spanish cruisers, and it was never so much as doubted by the commissioners appointed by the United States to distribute that indemnity, that they had authority to inquire into cases where the capture had been affirmed by the final decision of the competent tribunal of Spain. Further examples, continued Mr. Wheaton, it would be superfluous to give. Although the theory of the law of nations supposed the prize tribunals of the belligerent to decide exactly as if they were established by and sitting in a neutral country—that is to say, conformably to the public law common to both countries—yet it was common knowledge that in practice such tribunals took for their guide the prize ordinances and instructions issued by the belligerent sovereign, without stopping to inquire whether they were consistent with the paramount rule. This being so, the obvious consequence of considering their sentences as conclusive would be to invest the belligerent state with legislative power over the rights of neutrals, without regard to the rules of the law of nations. Such were the consequences which would

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<sup>1</sup> Vattel, liv. 2, ch. 7, sec. 85.



inevitably flow from such a misapplication of the doctrine of the conclusiveness of admiralty sentences. That they were conclusive on the question of prize or no prize, so as to effect a transfer of the property in the thing condemned from the original owner to the captor, was a principle of public law undeniable in itself and necessary to peace and commerce. It seemed to have been supposed by the Danish Government that the demand of the United States was for a judicial revision and reversal of the sentences of condemnation which had been pronounced in its tribunals, as the United States believed, in derogation of the public law. This supposition was erroneous. The demand of the United States "was for the indemnity to which the citizens of the United States were entitled in consequence of the denial of justice by the tribunals in the last resort, and of the responsibility thus incurred by the Danish Government for the acts of its tribunals."

Having thus endeavored to remove the preliminary objection of Denmark to the claims of the United States, Mr. Wheaton next proceeded to examine the allegations on which the seizure and condemnation of the vessels and cargoes sailing under the American flag were made and had been attempted to be justified. Following the classification made in his instructions, he said that these allegations were "principally three: 1. The possession of false and simulated papers by which, it was alleged, an American character was stamped on British property; 2. Sailing under British convoy whereby it was alleged our vessels lost the immunities of our flag and subjected themselves to be treated as British property; and 3. The possession of French consular certificates of origin after the French consuls were forbidden to give them, except to vessels sailing direct to French ports."<sup>1</sup> As to the first of these allegations, Mr. Wheaton declared "that the American Government, far from affording any favor or protection to the fraudulent assumptions of its flag during the late maritime war in Europe, would have been the first to denounce and punish them." Into the particular cases in which the Danish authorities alleged that such a use of the American flag was made he would not enter. These cases had been fully discussed by Mr. Erving whose arguments could not, said Mr. Wheaton, in his opinion, be satisfactorily refuted. He would therefore proceed to consider the grounds on which the seizure and condemnation of property confessedly belonging to citizens of the United States had been attempted to be justified by the Danish Government.

This involved, said Mr. Wheaton, the second Danish allegation, an allegation which had been applied to the cases included in the list (No. 1) inclosed in Mr. Erving's note to Mr. De Rosenkrantz of June 6, 1811. In these cases the property was condemned under the royal ordinance of March 28, 1810, clause 11, Article D, which declared to be "good and lawful prize such vessels as, notwithstanding their flag is considered neutral as well with regard to Great Britain as to the powers at war with the same nation, still, either in the Atlantic or Baltic, have made use of English convoy." Under this clause, said Mr. Wheaton, vessels and cargoes were condemned by the high court of admiralty, though in most if not in all such cases there was satisfactory proof that the vessels had been compelled to join the British convoy, and though the ordinance in question

<sup>1</sup> Mr. Clay, Sec. of State, to Mr. Wheaton, May 31, 1827, H. Doc. 249, 22 Cong. 1 sess.

was unknown at St. Petersburg when they sailed from that port. Whoever considered the geographical position of the Baltic Sea, its outlets into the ocean, and the winds and currents by which its navigation was affected, would readily perceive how difficult it must have been for neutral vessels passing during the late war through the narrow and sinuous channels to avoid becoming entangled in the numerous convoys of the enemy of Denmark, even supposing there was no disposition on the one side to receive, and on the other to impart, protection against the multiplied perils of those times. To make the protection accidentally received by or forcibly obtruded upon the neutral, under these circumstances, a ground of confiscation, was an injustice strikingly apparent. But it was less material, said Mr. Wheaton, to dwell on this aspect of the case, because the United States wholly denied the principle on which the clause in question was founded. This clause, as construed by the Danish tribunals, involved, so Mr. Wheaton declared, "the application of a principle (to say the least) of *doubtful* authority, to the confiscation of neutral property for a supposed offense, committed, not by the owner, but by his agent, without the knowledge or orders of the owners, under a belligerent edict, retrospective in its operation, because unknown to those whom it was to affect." As interpreted by the Danish tribunals, it made "the fact of having navigated under the enemy's convoy \* \* \* *per se*, a justifiable cause (not of capture merely, but) of condemnation in the tribunals of the opposite belligerent, and *that* without inquiring into the proofs of proprietary interest, or the circumstances and motives under which the captured vessel had joined the convoy, or into the legality of the voyage, or the innocence of her conduct in other respects." A belligerent pretension so harsh, apparently so new, and so important in its consequences, said Mr. Wheaton, must, before neutral nations could consent to it, be rigorously demonstrated on the authority of writers and the usage of nations; yet no expounder of the law of nations even mentioned it, and still less could it be asserted that any neutral nation had ever acquiesced in it. Great Britain had denied, while Denmark had asserted, the right of a neutral state to resist the exercise of the belligerent right of visitation and search by means of convoy consisting of its own ships of war, but even the records of the British courts might be searched in vain for any support of the pretension that the fact of having sailed under belligerent convoy was in all cases and under all circumstances conclusive cause of condemnation. The American vessels in question were engaged in their accustomed and lawful trade between the United States and Russia; they were unarmed and made no resistance to the Danish cruisers; they were captured on the return voyage, after having passed up the Baltic and been subjected to an examination by the Danish cruisers and authorities by which their neutrality was established, and they were condemned under an edict which was unknown when they left Cronstadt, and which, unless it could be shown strictly consistent with the preexisting law of nations, must be considered as an unauthorized measure of retrospective legislation. Being found in company with an enemy's convoy might indeed furnish a presumption that the captured vessel and cargo belonged to the enemy, but it was a slight presumption only, which would readily yield to counter-vailing proof, and for this purpose the vessel should have been permitted to show, for example, that she had been compelled to join the convoy, or

that she had joined it not to protect herself from examination by Danish cruisers but against others whose notorious conduct and avowed principles rendered it certain that captures by them would be followed by condemnation. Mr. Wheaton went still further and contended that since Denmark had, as a neutral, asserted the right to protect her commerce against belligerent visitation and search by means of armed convoys of her own public ships, she could not consistently assert a right to condemn neutral vessels for sailing under belligerent convoy. Great Britain treated navigating under the convoy of a neutral ship as a ground of condemnation, because it tended to defeat the lawful right of belligerent search and render every attempt to exercise it a contest of violence. But the belligerent had a right to resist; and the masters of the vessels under his convoy, not participating in his resistance, could no more be involved in the legal consequences of resistance than could the neutral shipper of goods on a belligerent vessel or the neutral owner of goods found in a belligerent fortress. The right of capture in war extended only to things actually belonging to the enemy, or to such as were considered as constructively belonging to him, because taken in a trade prohibited by the laws of war. It was not pretended that the American vessels in question were actually the enemy's property, and it could not be shown that they were constructively his. If they had been armed, and had thus contributed to augment the force of the belligerent convoy, or if they had actually participated in battle with the Danish cruisers, they would justly have fallen by the fate of war. But they were unarmed merchantmen, whose junction with the British convoying squadron, by expanding the sphere of its protection, tended to weaken it, and instead of participating in the enemy's resistance, there was in fact no battle and no resistance, and they fell a defenseless prey to the force of the assailants. The alleged illegality of the conduct of the neutral masters must therefore be referred back to the circumstance of their *joining the convoy*. Pursuing his argument from this point, Mr. Wheaton said:

"But why should this circumstance be considered illegal any more than a neutral taking shelter in a belligerent port, or under the guns of a belligerent fortress, which is subsequently invaded and taken? The neutral cannot indeed seek to escape from visitation and search by unlawful means, either of force or of fraud. But if, by the use of any lawful and innocent means, he may escape, what is to hinder his resorting to such means for the purpose of avoiding so vexatious a procedure? The belligerent cruisers and prize courts have not always been so moderate and just as to render it desirable for neutrals voluntarily to seek for an opportunity of being examined and judged by them. And if, in fact, in respect to the trade of the Baltic sea, the conduct of one of the great belligerent powers was more favorable to neutral commerce than that of the other, what should prevent the neutral from availing himself of this circumstance, so far as he might without infringing any just right of the latter? Upon the supposition that justice was administered promptly, impartially, and purely, in the prize tribunals of Denmark, the American ship-masters could have had no motive to wish to avoid an examination by Danish cruisers, since their proofs of property were clear, their voyages lawful, and they were not conscious of being exposed to the slightest hazard of condemnation in these tribunals. Indeed some of these vessels had been examined on their voyage up the Baltic, and acquitted by His Majesty's tribunals. Why, then, should a guilty motive be imputed to them, when their conduct can be more naturally explained by an innocent one? Surely, in the multiplied ravages to which the American commerce was then exposed on every

sea, from the sweeping decrees of confiscation fulminated by the great belligerent powers, the conduct of these parties may be sufficiently accounted for without resorting to the supposition that they meant to resist, or even to evade, the exercise of the belligerent rights of Denmark. Had they indeed been aware of the vexatious delays, the heavy expenses, and the arbitrary fines, to which they were exposed in the Danish tribunals, even in cases where restitution was finally awarded, and still more if they had been conscious that, where condemnation should be pronounced by those tribunals, upon grounds ever so slight, the formal sentences thus rendered would be considered as forming a perpetual bar to any subsequent appeal to the equity of His Majesty's government, they might have shrunk from the hazard of such fearful consequences, and taken shelter in the arms of that power, which was so soon to become the enemy of their country, rather than rely upon the justice of a state with which she had always cultivated the most amicable relations. On the other hand, had they known of the existence of the royal ordinance of March, 1810, which made the fact of having used British convoy a conclusive cause of condemnation, they would have preferred to encounter all these multiplied but contingent perils, rather than the certainty of the fate which awaited them on capture under convoy. So that the innocence of their motives, and the good faith of their acts, is manifest from every view of their conduct, whilst the supposition that they took shelter under enemy's convoy, because they were carrying an enemy's traffic, is contradicted by the satisfactory proofs which they furnished, of the neutrality of their property, and the lawfulness of their voyages.

"Even admitting, then, that the neutral American had no right to put himself under convoy, in order to avoid the exercise of the right of visitation and search by a *friend*, as Denmark professed to be, he had still a perfect right to defend himself against his *enemy*, as France had shown herself to be, by her conduct, and the avowed principles upon which she had declared open war against all neutral trade. Denmark had a right to capture the commerce of her enemy, and, for that purpose, to search and examine vessels under the neutral flag, whilst America had an equal right to protect her commerce against French capture, by all the means allowed by the ordinary laws of war between enemies. The exercise of this perfect right was wholly unaffected by the circumstance of the war existing between Denmark and England, or by the alliance between Denmark and France. America and England were at peace. The alliance between Denmark and France was against England, not against America; and His Majesty's Government, which refused to adopt the decrees of Berlin and Milan as the rule of its conduct towards neutrals, cannot surely consider it as culpable, on the part of the American shipmasters, to have defended themselves against the operation of those decrees, by every means in their power. If the use of any of these means conflicted in any degree with the belligerent rights of Denmark, that was an incidental consequence, which could not be avoided by the parties without sacrificing their incontestible right of self-defense.

"But it may perhaps be said that as resistance to the exercise of the belligerent right of visitation and search is, by the law and usage of nations, a substantive ground of condemnation in the case of the master of a single ship, still more must it be so where many vessels are associated for the purpose of defeating the exercise of the same right.

"In order to render the two cases here stated perfectly analogous, there must have been an actual resistance on the part of the vessels in question, or at least on the part of the enemy's fleet having them at the time under its protection, so as to connect them inseparably with the acts of the enemy. Here was no actual resistance on the part of either, but only a *constructive* resistance on the part of neutral vessels, implied from the fact of their having joined the enemy's convoy. This, however, was at most a mere intention to resist, never carried into effect, which has never been considered, in the case of a single ship, as involving the penalty of confiscation. And the Government of the United States has always regarded it [as] a peculiarly objectionable feature in the ordinance of 1810, as interpreted by the tribunals (which interpretation has never been disavowed

by the Danish Government), that it considered the fact of *having made use* of British convoy as an indelible offense, to be visited with the penalty of confiscation, even after the vessels had separated from the convoy, or on the return voyage where they had made use of convoy going up the Baltic.

"But the resistance of *the master of a single ship*, which is supposed to be analogous to the case of convoy, must refer to a *neutral* master, whose resistance would probably, by the established law of nations, involve both ship and cargo in the penalty of confiscation. The same principle would not, however, apply to the case of an *enemy* master, who, having an incontestible right to resist his enemy, such resistance could not affect the neutral owner of the cargo, unless he was on board, and had actually participated in the resistance.

"Such was, in a similar case, the judgment of Sir William Scott, whose decisions may certainly be considered as very good, and even conclusive authority, where he decides anything *favorable to neutral rights*, however questionable they may be thought where they tend to confirm belligerent pretensions. So, also, the right of a neutral to transport his goods on board of an *armed* belligerent vessel was solemnly affirmed by the decision of the highest tribunal in the United States, during the late war with Great Britain, after a most elaborate discussion, in which all the principles and analogies of public law, bearing upon the question, were thoroughly examined and considered.

"The American commissioner, then, confidently relies upon the position before assumed by him, that the entire silence of all the authoritative writers on public law as to any such exception to the general freedom of neutral navigation, laid down by them in such broad and comprehensive terms, and of every treaty made for the special purpose of defining and regulating the rights of neutral commerce and navigation, constitutes, of itself, a strong negative authority to show that no such exception exists, especially as the freedom is expressly extended to every case which has the slightest resemblance to that now in question. It cannot be denied that the goods of a friend, found in an enemy's fortress, are exempt from confiscation as prize of war; that a neutral may lawfully carry his goods in an armed belligerent ship; that the neutral shipper of goods on board an enemy's vessel (armed or unarmed), is not responsible for the consequences of resistance by the enemy master. How, then, can the neutral owner, both of ship and cargo, be responsible for the acts of the belligerent convoy, under the protection of which his property has been placed, not by his own immediate act, but by that of the master, proceeding without the knowledge or instructions of the owner?

"Such would certainly be the view of this question if we apply to it the largest measure of belligerent rights ever assumed by any maritime state. But when examined by those milder interpretations of public law, which the Danish Government, in common with the other Northern powers of Europe, has hitherto patronized, it will be found still more clear of doubt.

"If, as Denmark has always insisted, a neutral may lawfully arm himself against all the belligerents; if he may place himself under the convoying force of his own country, so as to defy the exercise of belligerent force to compel him to submit to visitation and search on the high seas, the conduct of the neutral Americans who were driven to take shelter under the floating fortresses of the enemy of Denmark, not for the purpose of resisting the exercise of her belligerent rights, but to protect themselves against the lawless violence of those whose avowed purpose rendered it certain that, notwithstanding their neutrality, capture would be followed by inevitable condemnation, will find its complete vindication in those principles which the publicists and statesmen of his country have maintained in the face of the world.

"Had the American commerce in the Baltic been placed under the protection of the ships of war of the United States, as it is admitted it might have been, the belligerent rights of Denmark would have been just as much infringed as they were by what actually happened. In that case, the Danish cruiser must (upon Danish principles) have been satisfied with the assurance of the commander of the American convoying squadron of the neutrality of the ships and cargoes sailing under his protection. But that assurance

could only have been founded upon their being accompanied with the ordinary documents found on board of American vessels, and issued by the American Government, upon the representations and proofs furnished by the interested parties. If these may be false and fraudulent in the one case, so may they be in the other, and the Danish Government is equally deprived of all means of examining their authenticity in both. In the one, it is deprived of these means by its own voluntary acquiescence in the statement of the commander of the convoying squadron; in the other, by the presence of a superior enemy's force preventing the Danish cruiser from exercising his right of search. This is put, for the sake of illustration, upon the supposition that the vessels under convoy had escaped from capture, for upon that supposition only could any *actual* injury have been sustained by Denmark as a belligerent. Here they were captured without hostile conflict, and the question is, whether they are liable to confiscation for having navigated under the enemy's convoy, notwithstanding the neutrality of the property, and the lawfulness of the voyage in other respects? Even supposing, then, it was the *intention* of the American shipmasters, in sailing with the British convoy, to escape from *Danish* as well as *French* cruisers, that intention has failed of its effect; and it may be asked what belligerent right of Denmark has been practically injured by such an abortive attempt? If any, it must be the right of visitation and search. But the right of visitation and search is not a substantive and independent right, with which belligerents are invested by the law of nations for the purpose of wantonly vexing and interrupting the commerce of neutrals. It is a right growing out of the greater right of capturing enemy's property or contraband of war, and to be used as means to an end to enforce the exercise of that right. Here the exercise of the right was never, in fact, opposed, and no injury has accrued to the belligerent. But it may be said that it might have been opposed, and entirely defeated, had it not been for the accidental circumstance of the separation of these vessels from the convoying force, and that the entire commerce of the world with the Baltic sea might thus have been effectually protected from Danish capture. And it may be asked in reply, what injury would have resulted to the belligerent rights of Denmark from this circumstance? If the property be neutral, and the voyage lawful (as they were in the present instance), what injury would result from the vessels escaping from examination? On the other hand, if the property was that of the enemy, its escape must be attributed to the superior force of the enemy, which, though a *loss*, would not be an *injury* of which Denmark would have a legal right to complain. Unless it can be shown that a neutral vessel navigating the seas is bound to *volunteer to be searched* by the belligerent cruisers, and that she has no right to avoid search by *any means*, it is apparent that she may avoid it by any means which are *not unlawful*. Violent resistance to search, rescue after seizure, fraudulent spoliation, or concealment of papers, are all confessedly unlawful means, which, unless extenuated by circumstances, may justly be visited with the penalty of confiscation. Those who allege that sailing under belligerent convoy is also attended by the same consequences, must show it by appealing to the oracles of public law, to the text of treaties, to some decision of an international tribunal, or to the general practice and understanding of nations. If all these are silent upon the subject, can it be expected that the Government of the United States will relinquish their claim to an indemnity for the property of their citizens thus captured and confiscated, even if the question were more doubtful than it is, upon principle and analogy?

"The third general ground of capture of American vessels and cargoes, that of their being possessed of French consular certificates of origin after the French consuls in the United States were prohibited by their own government to issue them, except to vessels bound directly to the ports of France, proceeded upon a mistaken assumption of fact. The French consuls were accustomed to give their certificates to any American vessel applying for them, without regard to the port of destination, except that it must be a port of France, or of an ally of France, or of a neutral power. In the year 1810 the French Government forbade the granting these certificates

to any other vessels than those bound to the ports of France; but the instructions to that effect did not reach the French consuls in the United States until the 13th of November of that year, prior to which time those certificates bore date which were made the pretext for the seizure of American vessels by the Danish cruisers. Even if the certificates had been spurious, as was supposed, contrary to the fact, that would not have been a justifiable cause for the seizure and confiscation of an American vessel under Danish authority, whatever might have been the consequences in the tribunals of France of a capture by a French cruiser. As to Denmark, a French certificate of origin, not being a document required by the law of nations, was a paper altogether unimportant and superfluous. Indeed it is difficult to conceive how it should even have been otherwise considered by the Danish tribunals, since it is said that His Majesty had not adopted the decrees of Berlin and Milan, and the other violent measures of France against neutral trade.<sup>1</sup>

**Conclusion of a  
Convention.**

In communicating this argument to his government, Mr. Wheaton said he flattered himself that the views he had taken of the question of the conclusiveness of prize sentences would induce the Danish Government "once more to abandon this ground." It seems to have had that effect, though it did not at the moment produce any apparent result.<sup>2</sup> Nevertheless, after further negotiations the Danish commissioners at length offered a sum which Mr. Wheaton decided to accept, and on March 28, 1830, he signed with them a convention in which provision was made for its payment.<sup>3</sup>

**Terms of the Con-  
vention.**

By this convention His Majesty the King of Denmark, while renouncing the indemnities which "might be claimed" from the Government of the United States on account of the seizure, detention, condemnation, or confiscation of vessels, cargoes, or other property, engaged to pay to the United States the sum of 650,000 Spanish milled dollars, "on account of the citizens of the United States who have preferred claims relating to the seizure, detention, condemnation, or confiscation of their vessels, cargoes, or property whatsoever, by the public and private armed ships, or by the tribunals of Denmark, or in the states subject to the Danish scepter." It was agreed that this sum should be paid in three equal installments on March 31, 1831, September 30, 1831, and September 30, 1832, respectively, with interest on the second and third installments from March 31, 1831, at the rate of 4 per cent per annum. The distribution of the fund was committed to the United States, and for the purpose of adjusting the claims described in the convention the United States engaged to establish a "board of commissioners, consisting of three citizens of the United States," who should

<sup>1</sup> H. Doc. 249, 22 Cong. 1 sess. 34-38.

<sup>2</sup> H. Doc. 249, 22 Cong. 1 sess. 22.

<sup>3</sup> With reference to the sum which he accepted, Mr. Wheaton, in a dispatch to Mr. Van Buren, said: "I have not before me sufficient material from which to form a judgment as to the real amount of the losses unjustly sustained by our citizens from Danish captures. You will find that Mr. Erving, in his correspondence, estimates the actual loss at about \$1,750,000, reckoning about thirty-five condemnations 'quite unjust,' to use his own expression. But supposing the real injury to have been considerably greater, the sum now recovered, considering the diminished resources of this exhausted country, will, I trust, be considered as a tolerable salvage from this calamitous concern." (Davis's Notes: Treaties and Conventions, 1776-1887, p. 1287.)

be appointed by the President, by and with the advice and consent of the Senate, and who should meet at Washington and within two years from the time of their first meeting "receive, examine, and decide upon the amount and validity of all such claims, according to the merits of the several cases, and to justice, equity, and the law of nations." The commissioners were required to take an oath or affirmation "for the faithful and diligent discharge of their duties." They were "authorized to hear and examine, on oath or affirmation, every question" relating to the claims before them, and "to receive all suitable authentic testimony concerning the same." And in order to facilitate the proceedings of the board the King of Denmark engaged, "when thereunto required, to cause to be delivered to any person or persons who shall be duly authorized for that purpose by the Government of the United States, in addition to the papers already delivered, all the acts, documents, ship's papers and prize proceedings which may still remain in the archives of the High Court of Admiralty, or the Prize Tribunals of Denmark, relating to the seizure, detention, condemnation, or confiscation of the vessels, cargoes, or property whatsoever, belonging to the citizens of the United States of America before the said tribunals." It was further provided that the commissioners should "award and cause to be distributed, among the several parties whose claims shall be allowed by the board, the sum mentioned" in the convention, in proportion to the amounts of their respective claims thus allowed. Finally it was declared that the "intention of the two high contracting parties being solely to terminate, definitely and irrevocably, all the claims which have hitherto been preferred," the convention was "only applicable to the cases therein mentioned, and having no other object can never hereafter be invoked by one party or by the other as a precedent or rule for the future."

In order to carry this convention into effect, an act  
 Act of Congress. was passed by Congress<sup>1</sup> by which it was provided that "the commissioners who are or may be appointed by the President of the United States, by and with the advice and consent of the Senate, in pursuance of the third article of the convention," should meet at Washington, and within two years from the time of their first meeting "receive, examine, and decide upon the amount and validity of all such claims as may be presented to them and are provided for by the convention referred to, according to the merits of the several cases, and to justice, equity, and the law of nations, and according to the provisions of said convention." The President was authorized to appoint a secretary to the commission, and the commissioners, or a majority of them, with the secretary, were required to convene at Washington on the first Monday in April 1831 and to proceed to execute the duties of their commission. It was provided that all papers in the Department of State relating to the claims should be delivered to the commission. The commissioners were empowered to make all needful rules and regulations for the government of their procedure. Their salary was fixed at \$3,000 a year and that of the secretary at \$2,000, and the President of the United States was authorized to make provision for their contingent expenses. At the close of their labors they were directed to deposit their records and all other

<sup>1</sup> Act of February 25, 1831, 4 Stats. at L. 446.



papers in the possession of the commission or its officers in the Department of State.

As commissioners the President appointed George Winchester, William J. Duane, and Jesse Hoyt, and as secretary Robert Fulton. They met in Washington on Monday, April 4, 1831, and in obedience to the act of Congress took an oath faithfully to perform the duties of their respective offices.<sup>1</sup> The commissioners then addressed a letter to Mr. Van Buren, as Secretary of State, informing him of their organization, and received in reply, at their rooms, "in a building on Capitol Hill, formerly occupied by Congress," several boxes of papers. In the letter with which these papers were transmitted Mr. Van Buren informed the commissioners that an agent had been sent by the United States to Sweden, with the permission of the government of the latter country, for the purpose of withdrawing from the tribunals of Norway such documents as might be useful and necessary in deciding upon claims under the convention.

On the 6th of April 1831 the commissioners adopted the following rules:

**Rules.**

"*Ordered*, that all persons having claims under the convention between the United States of America and His Majesty the King of Denmark, concluded and signed at Copenhagen on the 28th day of March 1830, which are to be received by the commissioners, do file a memorial of the same with the secretary of the board to the end that they may hereafter be duly examined, and the validity and amount thereof decided upon, according to the merits of the several cases and the suitable and authentic testimony concerning them which may hereafter be required. The said memorial must be addressed to this board. It must set forth minutely and particularly the various facts and circumstances whence the right to prefer such claim is derived. It must be verified by the affidavit of the claimant.

"And in order that claimants may be informed of what is now considered by the commission as essential to be averred and established before any such memorial can be received by this board, it is further,

"*Ordered*, that each claimant shall declare in his said memorial, for and in behalf of whom the said claim is preferred, and whether the amount thereof, and of any part thereof, if allowed, does now, and at the time when the said claim arose did, belong solely and absolutely to the said claimant or to any other, and if any other, what person; and in cases of claims preferred for the benefit of any other than the claimant, the memorial to be exhibited must further set forth, when, why, and by what means, and for what consideration, such other has become entitled to the amount or any part of the amount of the said claim. The memorial required to be exhibited by *all claimants* must also set forth and certainly declare, whether the claimant, as well as any other for whose benefit the claim is preferred, is now, and at the time when the said claim arose, was, a citizen of the United States of America—where he is now, and at the time the said claim arose was, domiciliated, and, if any, what change of domiciliation has since taken place.

"The said memorial must also set forth whether the claimant, or any other who may have been at any time entitled to the amount claimed, or any part thereof, hath ever received any, and if any, what sum of

<sup>1</sup>The oath, which was taken before a justice of the peace of the District of Columbia, was as follows: "I do solemnly swear that I will faithfully and diligently discharge the duties of my office, and that I will support the Constitution of the United States."

money, or other equivalent or indemnification by way of insurance or otherwise, for the loss or injury sustained, satisfaction for which is therein asked. And if such payment or indemnification has been made, to set forth when and from whom the same was received.

"And that time may be allowed to the claimants to prepare and file the memorials above mentioned,

"It is further *ordered*, that when this board shall close the present session, it will adjourn to meet again on the eleventh day of July next; at which time it will proceed to decide whether the memorials filed with the Secretary are in conformity to the foregoing orders, and proper to be received for examination.

"*Ordered*, that a copy of these proceedings be published by the Secretary of this board, in all the newspapers in which the laws of the United States are printed."

After adopting the foregoing rules the commissioners made an order authorizing the secretary "to permit claimants or their agents to examine and, if needful, copy papers in his possession," but forbidding the taking or copying of any such paper out of the office of the commission.

On the 7th of April the commissioners ordered that a *Notice of Organization*, notice of the organization of the commission should be published in the *Globe* and the *National Intelligencer* in Washington, and in all other journals in which the Department of State had caused prior notice of their meeting to be published. The commissioners then adjourned to meet again on the 11th of the ensuing July.

At the second session of the commission the only *Second Session*. business of any importance that was transacted was the adoption on July 16 of resolutions with respect to the filing of further memorials, the examination of claims, the taking of testimony, and the reception of arguments. These resolutions were as follows:

"*Ordered*, that all persons having claims to be decided upon by this board, memorials of which claims have not yet been presented, or which, having been presented, have not been received by this board, do file original or supplemental memorials, as the case may be, in their several claims on or before the first Monday in October next, and that each of the said memorials shall be prepared and verified in conformity with the rules prescribed in the order of this board of the 16th [6th] of April last.

"*Ordered*, that all cases in which memorials have been received by this board be set down for examination after the expiration of six months from the date hereof; if, however, after the lapse of said term, any claimant shall show good cause for not then entering upon the examination, a further time may be allowed.

"*Ordered*, that in all cases where claimants shall deem it necessary to take testimony in support of their claims, the said testimony, if taken within a district where commissioners have been appointed by the circuit court of the United States to take affidavits, shall be taken before such commissioner; if no such commissioner, then before any other person qualified by law to administer an oath.

"*Ordered*, that all persons having claims under the convention between the United States and His Majesty the King of Denmark, be permitted to support their respective claims by the arguments of counsel, but that every such argument shall be reduced to writing and filed in the Secretary's office.

"*Ordered*, that the several claimants under the said convention be permitted, under the direction of the secretary of this board, and in his office, to examine the memorials and documents in the several cases before this board, and to file objections accompanied by arguments in such cases as in the opinion of the remonstrants ought not to be favorably

received: such objections and arguments, in cases in which memorials have been received, to be filed prior to the first Monday in January 1832.

"Ordered, that when this board adjourn, it will adjourn to meet again on Monday the third day of October next, at which time it will proceed to decide whether any memorials which may have been filed with the secretary prior to said 3rd of October in pursuance of the above order, shall be received for examination."

**Third and Fourth Sessions.** The third session of the board began on the 3d of October and closed on the 5th. The fourth session opened, pursuant to adjournment, on the 9th of January 1832. On the 12th of January an order was adopted to the effect "that no paper or document filed with a memorial shall be allowed to be withdrawn from the office unless upon written application by the claimant, supported by affidavit stating that the object is to withdraw the paper for the purpose of authenticating the same or proving the facts which it contains before some one of the persons authorized to take testimony in cases depending under this commission."

On the 2d of February further orders were made. On the 7th of the preceding October a notice was published by direction of the board to the effect that it would, on the opening of its fourth session on the 9th of January 1832, proceed to determine the validity of all claims which should then have been filed and docketed. By the 2d of February the commissioners had disposed of all such claims as were ready for hearing; but it was found that a number of the cases, though duly filed and docketed, were not ready to be heard, and that in some of them the claimants had not exhibited "as much industry in preparation" as they should have done. The commissioners therefore gave notice that all persons having claims should present them on or before the 1st of the following May, verified in conformity with the rules of the board and accompanied with all proofs which they might think material; that when the board next met, on the 23d of April, it would proceed to decide all claims then filed but not previously acted on, and that after the 1st of May no memorial would be received unless satisfactory cause for not filing it before was shown.<sup>1</sup>

At the same time the board published certain rules of decision to which a fuller reference will be made hereafter.

**Fifth and Sixth Sessions.** The fifth session of the board began on the 23d of April 1832, and ended on the 10th of May, when an adjournment was taken till the first Monday in October. On that day the sixth session began, but only Mr. Duane appeared, the two other commissioners being ill. The sixth session was therefore ordered to stand adjourned till the 26th of November, and on that day the commissioners reassembled. They remained in session till December 19, when it was ordered that, as several applications had been made for rehearings, and as the board was anxious to afford claimants every opportunity to prove their claims, the commission would adjourn till March 1, 1833, a month before the termination of the period prescribed for its existence, and that no application for a rehearing or for filing original or supplemental memorials, or for the introduction of proof, would be received after that day.

<sup>1</sup> MSS. Dept. of State.

The seventh and last session of the board did not actually begin till the 4th of March 1833. On the 1st of March only one commissioner was present, and on the 2d there were only two. They did not all appear until the 4th.

It has heretofore been stated that the commissioners on the 2d of February 1832, at the close of their fourth session, published certain rules of decision. These rules were as follows:

"THURSDAY, February 2, 1832.

"The board, having been for some time engaged in considering the validity of the claims which have been filed and docketed, and the proofs in support thereof, deem it proper to lay down certain rules, to be adhered to in all cases which shall not present a peculiar claim to exception from their operation:

"Regarding the fund provided by the convention with Denmark as designed to indemnify claimants for the actual losses, and not for profits, which might or might not have been realized—it is *Ordered*, That in cases of condemnation, remuneration shall be made according to the actual value of vessel and cargo respectively, at the commencement of the voyage.

"Considering the absence of proof in some cases, and its imperfection in others, in relation to *freight*, *insurance*, *demurrage*, and *damage* owing to detention; and consequently, that exact justice cannot be done in each particular case; comparing, besides, the several claims for freight, insurance, demurrage, and damage, with each other, and finding no standard therein—it is

"2nd. *Ordered*, That in all cases of condemnation or detention there shall be allowed two-thirds of a fair *freight* for the passage in which the loss occurred, [and] a premium of insurance at the rate of — per cent upon the value of the vessel and cargo respectively at the commencement of the voyage.

"3. That in all cases of detention of vessels, there shall be allowed, besides, for demurrage—

" ——— dollars per day on vessel under 150 tons burthen.
" ——— " " " " " between 150 and 200, inclusive.
" ——— " " " " " above 200.

4. That in cases of detention of cargo, there shall be allowed for damages at the rate of — per cent per year.

"That in cases in which special damage shall be proved, as where the cargo was in whole or in part of a perishable nature, or was wasted or destroyed, an additional allowance should be made according to the facts.

"This allowance to be in full for all injuries resulting from capture and detention, including cases in which voyages were broken up, and all other speculative damages.

"5. That in all cases, the expenses incurred in defending vessel and cargo shall be allowed in full.

"As the board cannot anticipate whether the fund distributable under the convention with Denmark will, or will not, be adequate to the payment of all the sums which shall be awarded by this commission; it is

"*Ordered*, that in each case such sum shall be awarded and stated as the board shall believe would be justly payable, were the fund adequate; and that if the fund shall not be adequate to pay the aggregate amounts allowed to all the claimants, a 'pro rata' distribution shall be made in conformity with the provisions of the convention. It is further

"*Ordered*, that an entry be now made on the record of all the decisions made by the board at its present session."

In applying these rules the board discovered that they "would not operate \* \* \* equally upon various classes and descriptions of claims presented." The board therefore at its sixth session changed the rules and, setting aside all decisions that had been made in conformity with them, proceeded to make awards in accordance with a series of amended

rules. These rules the board on the 22d of March 1833 ordered to be entered on the minutes. They were as follows:

"That in all cases of *condemnation* there shall be allowed,

"1st. The value of the vessel agreeably to the following scale:

"For Eastern vessels—\$40.00 per ton.

"For Northern vessels—\$30.00 per ton.

"2nd. The value of the cargo at the cost of the same in the port from whence she sailed, agreeably to the invoice, without any addition to the invoice for freight or insurance.

"3rd. A premium of insurance, at the rate of eight per cent upon the value of the vessel and cargo.

"4th. Freight, for the voyage in which the loss occurred, at the rate of twelve dollars per ton.

"5th. Demurrage, on the following scale:

"\$15.00 per day for vessels under 150 tons.

"\$20.00 per day for vessels between 150 and 200 tons.

"\$25.00 per day for vessels between 200 and 300 tons.

"\$30.00 per day for vessels over 300 tons.

"That, in all cases of *detention* of vessel and cargo, there shall be allowed as follows:

"1st. Freight, at the rate of six dollars per ton.

"2nd. Premium of insurance, at the rate of eight per cent upon the value of vessel and cargo, respectively, at the commencement of the voyage.

"3rd. For the detention of the vessel, for demurrage:

"\$20.00 per day on vessels under 150 tons.

"\$25.00 per day on vessels between 150 and 200.

"\$30.00 per day on vessels between 200 and 300.

"\$40.00 per day on vessels over 300 tons.

"That for detention of cargo there shall be allowed for damages, at the rate of twelve per cent per annum; and in cases of detention where special damages shall be proved, as where the cargo was in whole or part of a perishable nature or was wasted or destroyed, an additional allowance shall be made according to facts.

"This allowance to be in full for all injuries resulting from capture and detention, including cases in which voyages were broken up, and all other speculative or consequential damages.

"In all cases the expenses incurred in defending the vessel and cargo in the course of judicial investigation shall be allowed in full, but no other claim for expenses shall be allowed.

"In all cases where the claim is presented by an underwriter, he shall receive no other or greater allowance for the loss or detention of vessel—cargo—or freight, than would have been allowed to the owner agreeably to the foregoing rules."

The last meeting of the board was held on the 28th of March 1833, when the commission adjourned *sine die*.

Prior to their adjournment the commissioners signed a report to the Secretary of State giving an account of their proceedings, and directed it to be recorded in the journal. This report, to which is annexed the order of adjournment, is as follows:

THURSDAY, 28 March 1833.

TO THE SECRETARY OF STATE OF THE UNITED STATES:

"The undersigned Commissioners, Citizens of the United States, appointed by the President, by and with the advice and consent of the Senate, having performed the duties with which they were charged, under the Convention between the United States and His Majesty the King of Denmark, bearing date the twenty-eighth day of March 1830, beg leave to submit an account of their proceedings in the following report.

"The Undersigned having received their appointments from the President of the United States, in conformity to the third article of the Convention, assembled at the city of Washington on the 4th day of April

1831, and organized a Board pursuant to the provisions of the said Convention and the act of Congress appertaining thereto.

"On the succeeding day they received from the Department of State various papers and documents, and from time to time thereafter certified copies of sentences in the Tribunals of Denmark, transmitted agreeably to the stipulations of the said Convention.

"At this session of the Board various preliminary rules, or orders, and forms of proceeding were established, and, in the first place, an order was made, whereby all persons having claims under the said Convention were required to file a memorial of the same with the Secretary of this Board, to the end that they might be examined, and the validity and amounts thereof decided upon, according to the suitable and authentic testimony concerning the same, which order, as well as those subsequently made by the Board, was extensively circulated through the medium of the public newspapers.

"The Second Session of the Board was held, agreeably to notice for that purpose given, and which session commenced on the 11th day of July 1831; and notwithstanding the Convention had been ratified for more than a year, and a large majority of the claimants had long before filed their claims in the Department of State, the Board had before them but 257 memorials, many of which were not received by the Board, but some of them were at subsequent meetings again presented for consideration, and were finally received. Upon disposing of all the business before them at this session, the Board adjourned to meet again on the third day of October 1831, at which time it was found that there were 187 new memorials presented, making in all 444 up to that period.

"After examining the new memorials, and recording those which had been presented at the previous meetings, the Board then determined to set down all the memorials for hearing and final decision, and gave notice to this effect in the usual manner, that the claimants might come prepared to sustain their claims.

"At the Fourth session, which commenced on the ninth day of January 1832, the Board ascertained that 105 new memorials had been filed since the last adjournment; after preliminary disposal of which the Board proceeded to consider and decide all the cases which were ready for hearing, in pursuance to the notice previously given.

"The Board finding but a few cases ready for hearing, and that there had been great procrastination on the part of the claimants in furnishing the necessary proofs, thereupon adjourned to meet again on the 23rd day of April following.

"The Board at the opening of their fifth session ascertained that 57 memorials had been filed during the last vacation. Those were all acted upon and preliminarily disposed of according to the rules which had been adopted. After having heard some of the principal questions pending before this Board discussed by eminent counsel, and acted upon all the cases ready for hearing, the Board adjourned to meet again on the first day of October following.

"In consequence, however, of the indisposition of a majority of the Board, and of the epidemic which then prevailed at the city of Washington and other parts of the United States, one of the members of the Board repaired to Washington and adjourned the sitting of the Board to the 26th day of November following.

"On that day the Board again assembled, and continued in session from time to time until they had disposed of all the cases that were ready for hearing. Even at this late date 20 new memorials were presented, received, and disposed of according to the rules of the Board.

"Notice of the final session, to be held on the 1st day of March 1833 was given in the following order, which was published in the usual manner for the information of the claimants:

"Ordered, that the Board of Commissioners had hoped to close the adjustment of claims under the Convention with Denmark during the present session, but having received several applications for re-hearing, and being anxious to afford to claimants every possible means of establishing

their claims in those cases, and in others where there was a deficiency of proof, have determined to adjourn to the first day of March 1833. And as there is but one month after that period allowed by law for the final settlement of the claims, and distribution of the funds, it has become necessary to order, and notice is hereby given, that no application for rehearing or for filing original or supplemental memorials, or the introduction of proof, will be received after the first day of March 1833.

"Notwithstanding the positive terms of this order, and the absolute necessity of its adoption, the Board, feeling great reluctance to shut out any claims which might be entitled to come under the Convention, waived the foregoing order, and received twenty-five new memorials, and all the testimony offered in all the cases, and considered and acted upon the same.

"The object of the Board being only to effect as just and equitable a distribution of the fund as possible, to this end the Board at its second session passed an order and caused it to be published, giving the right to any claimant to file objections, and to support the same by argument or reference to proofs, against the admission of any other claims; and by this course the Board hoped to be aided in arriving at the truth and the application of just principles to each and all of the cases. The Board, however, did not reap as much benefit from this privilege as they had anticipated; nevertheless, the undersigned feel satisfied that the course adopted from time to time in granting indulgence to the claimants in the manner suggested was the only one dictated by the principles of justice. Indeed, it may with more propriety be said that the course pursued was one which had been dictated by the very nature of the cases arising under the Convention, rather than marked out by the Commissioners. If less time had been allowed the claimants, it is manifest to the Board that great injustice must have been done to many of them, who were guilty of no fault and to whom no negligence could be imputed.

"With this brief explanation of the course pursued by the Board, and their reasons for adopting it, they will now proceed to state the results of their whole operations.

"The gross amount of claims brought before the Board was upwards of three millions of dollars, and the total amount allowed is \$2,154,425. To pay these amounts the convention provided the sum of \$650,000, and interest on the installments, which together, it appears by a statement furnished the Board by the Secretary of the Treasury, amount to the sum of \$670,564.70, which by a computation it will be seen is 31 and  $\frac{1}{4}$  per cent on the gross amount allowed.

"The Schedule A will show the amount awarded to each claimant, and the amount of the dividend thereon.

"These documents exhibit a full and distinct view of the disposition of the fund committed to the charge of the Board.

"The Commissioners have nothing further to add than that they herewith send to the Department of State a journal, or record, of the proceedings, which shows with a more detailed accuracy the proceedings of the Board, from the time of its organization to the day of its final adjournment. The undersigned would recommend that Schedule A be transferred to the Treasury Department as a guide for the payment of the respective awards, and they would also suggest its speedy publication for the information of all those whom it may concern, or that such other mode may be adopted by the proper officers of the Government of the United States as may be suggested for the more convenient attainment of the object to be accomplished.

"All of which is respectfully submitted.

"GEO. WINCHESTER.

"J. HOYT.

"W. J. DUANE.

"Test:

"ROBERT FULTON, *Secretary*.

"The Board having thus completed the duties which were assigned to them, hereby order, that the Records of their proceedings, together with all the vouchers and documents produced relative to the claims preferred

to them, be deposited in the Department of State; and as the undersigned are of opinion that no further business will be laid before them appertaining to their duties as Commissioners under the said convention, and that no good object is to be answered by their continuing in session, do hereby agree to adjourn without day, and they do hereby adjourn without day.

"GEO. WINCHESTER.

"J. HOYT.

"W. J. DUANE.

"Test:

"ROBERT FULTON, *Secretary.*"

In connection with the settlement of the claims against Denmark for spoiliations it is proper to refer to the case of the three British vessels captured in 1779 by the *Alliance*, Captain Landais, of the squadron under John Paul Jones, and carried into Bergen, in Norway, where, on the demand of the British minister, they were seized by the Danish Government and restored to their owners on the ground that, as Denmark had not acknowledged the independence of the United States, the prizes could not be considered as lawful. In a note to M. Bernstorff, the Danish minister for foreign affairs, of December 22, 1779, Franklin asked that the order of restoration be repealed, or that if it had been executed the value of the prizes, which was estimated at £50,000, should be paid by Denmark to the United States. M. Bernstorff answered evasively, though in substance he pleaded duress as an excuse for the order, which had been carried into effect.<sup>1</sup> In 1787 Congress instructed Jefferson, who was then minister of the United States at Paris, to make a representation on the subject to the King of Denmark; and Jefferson authorized Jones to pursue the claim at Copenhagen. Nothing, however, was accomplished, and in 1806 Congress passed an act appropriating \$4,000 to Landais as prize money on account of the captures.<sup>2</sup> In 1812 Mr. Monroe as Secretary of State addressed an inquiry in regard to the claim to Mr. Pedersen, then Danish chargé d'affaires at Washington, who replied that his government never had considered the claim as legal, and that it now regarded it as superannuated and abandoned. Subsequently the matter was several times brought to the attention of Congress.<sup>3</sup> But after the present convention with Denmark was carried into effect a question arose as to whether the claim was not barred by its provisions. An examination of them led the United States to conclude that it was not. While the high contracting parties by Article V. declared it to be their intention to terminate "all the claims which have hitherto been preferred," they also declared "that the present convention is only applicable to cases therein mentioned." The claims against Denmark mentioned in the convention were described in Articles I. and IV. In Article I. they were described, as we have seen, as "claims relating to the seizure, detention, condemnation, or confiscation of their (American citizens') vessels, cargoes, or property whatsoever, by the public and private armed ships, or by the tribunals of Denmark, or in the states subject to

<sup>1</sup> Wharton's Dip. Cor. Am. Rev. III. 385, 433, 435, 528, 534, 540, 597, 678, 744; V. 462; VI. 261, 717.

<sup>2</sup> Act of March 28, 1806, 6 Stats. at L. 61.

<sup>3</sup> H. Rep. 389, 25 Cong. 2 sess.



the Danish scepter." In Article IV. they were described as "the claims hitherto preferred, or which may hereafter be preferred, relating to the seizure, detention, condemnation or confiscation of the vessels, cargoes, or property whatsoever, which in the last maritime war of Denmark have taken place under the flag of Denmark, or in the states subject to the Danish scepter." These descriptions were construed by the United States as excluding the claim for the Bergen prizes.<sup>1</sup> In 1848, however, Congress authorized the Secretary of the Treasury to pay to the legal representatives of Jones, and of the officers, seamen, and marines, their just proportions of the value of the prizes, adjusting their claims on principles of justice and equity, and deducting from Landais's share the sum which he received under the act of 1806.<sup>2</sup>

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<sup>1</sup> H. Ex. Doc. 264, 28 Cong. 1 sess.

<sup>2</sup> Act of March 21, 1848, 9 Stats. at L. 214; Lawrence's Wheaton, 3 ed. note 16, p. 41.

"SIR: In answer to your letter of the 1st instant, requesting permission, on behalf of Mr. Tennant, to withdraw from the Department of State the papers filed by him with the Commissioners under the Danish convention, I have to inform you that those papers having been deposited in this Department in conformity with the act of the 25th of February, 1831, which directs that on the close of the commission the records, documents, and all other papers in the possession of the commission or its officers shall be deposited in this Department, and which makes no provision for any subsequent disposition of any portion of them, either by returning them to the claimants or otherwise, I do not consider myself authorized to permit them to be withdrawn. Copies of those papers, however, which relate to the claim of Mr. Tennant, will be furnished to you, upon the payment of the charges fixed by law for the same, and they have, agreeably to the request made by you to Dr. Jones, been ordered to be made." (Mr. McLane, Sec. of State, to Mr. Kennedy, January 4, 1834, MS. Dom. Let. XXVI., 135.)



## CHAPTER G.

### THE NEAPOLITAN INDEMNITY: CONVENTION OF OCTOBER 14, 1832.

Among the "allied" powers to whom Napoleon caused his Berlin and Milan decrees to be communicated was the kingdom of Naples. The government of the

kingdom, wisely heeding the intimation, promptly reenacted them—the Berlin decree on December 21, 1806, and the Milan on January 9, 1808. But the effect of these measures on the commerce of the country was so destructive that on March 31, 1809, the government, with a view to supplying the needs of the people, issued a decree inviting the importation by neutral vessels of certain enumerated articles. This measure did not, however, obtain the response that was expected; and for the purpose of securing importations, Murat, as Joachim the First, King of Naples, on June 30, 1809, issued a special decree by which American vessels were by name authorized to import into the kingdom not only the articles enumerated in the decree of the preceding March, but also rice and staves, Peruvian bark and other drugs, Georgia, Louisiana, and Carolina cotton, Java coffee and sugar. Moreover, the Marquis of Gallo, secretary for foreign affairs, on July 1, 1809, by order of the King, addressed a communication to F. Degan, esq., United States consul at Naples, by which it was declared to be the intention of His Majesty, as a general measure, freely to admit American vessels coming directly to his ports, provided they had regular papers and had not by paying duty to Great Britain, or by submitting to be searched by British cruisers, brought themselves within the decrees of December 21, 1806, and January 9, 1808.

To these various solicitations the American merchants responded. The first two or three vessels that arrived were fairly treated, and were permitted to dispose of their cargoes. Their good fortune lured on a larger number, and when these arrived they were seized and confiscated. From 1809 to 1812 49 vessels or cargoes, or both, of the value of more than \$2,000,000 were thus disposed of: 15 in 1809; 24 in 1810; 2 in 1811; 8 in 1812. Upward of 39 vessels and cargoes were confiscated under a single decree issued by Murat March 12, 1810, which was as follows:

NAPLES, *March 12, 1810.*

"Joachim Napoleon, King of the Two Sicilies, has decreed and does decree that which follows:

"ART. 1. In conformity with the orders which we gave from Paris the 21st of December 1809, we declare confiscated the American vessels whose names are subjoined, that is to say: The *Augustus*, *Hercules*, *Zephyr*, *Sophia*, *Romp*, *Two Betseys*, *Kite*, *Sukry* and *Betsey*, *Mary*, *Capt. Derby*, *Syren Emily*, *Capt. Waterman*, *Francis*, *Hound*, *Peace*, *Victory*, *Dore*, *Urania*,

*Fortune, William, Nancy, Maria, Hamilton, Phoenix, Ousitonack, Rose and Mary, Orizombo, Amherst, Mary Ann, Louisiana, and the John.*

"ART. 2. Such of the cargoes of the said vessels as have not yet been sold, as well as the ships, are hereby directed to be disposed of by public sale, by the minister administrator-general of the indirect duties, and under the inspection of our minister of finances, or may be otherwise sold at private sale, by the said minister, as he shall judge most conducive to our interests.

"ART. 3. The proceeds of these sales shall be deposited in a particular bank, to be hereafter employed as we shall judge convenient.

"ART. 4. If any of the captors of the aforesaid vessels have claims upon them which they may think proper to advance, they are authorized to present and explain their pretensions in relation to the same, and we shall decide thereupon in pursuance of the report which we shall cause to be made to us by our minister of the finances and the minister of the marine and of war, after having taken the opinion of a commission composed of one of the administrators-general of indirect duties, of one member of the council of maritime prizes, and of one officer of the marine.

"Our ministers of the finances, of war, and of the marine, are charged, as far as it concerns them respectively, with the present decree.

"JOACHIM NAPOLEON."

The only justification ever alleged for this decree was the act of Congress of March 1, 1809, which forbade commercial intercourse between the United States

on the one hand and Great Britain and France on the other, an act which had no relation to Naples, and which was passed four months before the decree inviting American vessels to enter that kingdom. The object of the decree of March 12, 1810, was to confiscate all vessels and cargoes which had arrived between August 27, 1809, and February 20, 1810. As no American vessel had arrived between the latter date and March 12, it seems to have been assumed that no more would come, and that nothing would be gained by postponing the confiscations. Other vessels, however, subsequently arrived, and some of these were confiscated by ministerial letters addressed to the custom-house. In most cases it was impossible to obtain copies of these orders, since it was the policy of Murat's government to refuse copies of any documents which might incriminate it. It seems that some of the papers were destroyed, in order effectually to prevent subsequent exposure. Protests against the confiscations were made in vain. When the vessels were condemned their masters were compelled to draw on the owners even for port charges. Their crews were left to starve, or else to be supported by the United States consul, who in the end had to charter a vessel in which to send them home.

In 1816 William Pinkney was appointed minister of the United States to Russia, and also to Naples. His mission to Naples was special, for the purpose of obtaining indemnity for the injuries which have been described.<sup>1</sup> After holding several conferences with the Marquis di Circello, then Neapolitan secretary for foreign affairs, Pinkney on the 24th of August 1816 addressed to him a note in which he set forth the nature of the claims of the United States and the grounds on which their payment was demanded. The Neapolitan government did not dispute, but on the contrary expressly affirmed, the injurious character of the acts on which the claims were founded.

<sup>1</sup>Am. State Papers, For. Rel. IV. 160.

But it denied the liability of the restored or "legitimate" government of the kingdom for the acts of Murat. Pinkney therefore addressed himself especially to this question. The persons who ruled Naples when the injuries were inflicted passed away before retribution could be obtained, although not before it was required; but the claims for it, said Pinkney, remained valid against the government of the country, notwithstanding the change of rulers. It was a principle universally received as incontrovertible, that a civil society was not absolved from obligations incurred by its actual government, simply by a change of government or of rulers. Merchants were not required to investigate the titles of sovereigns whose ports they visited. If they saw the usual indications of established rule, and all the distinguishing concomitants of real undisputed power, it was not within their province to determine whether it was fit for the people to obey and neighboring princes to acquiesce. They were not bound to look beyond the conditions that actually existed, and indeed were not permitted to do so. At the time of the confiscations in question the government of Murat, whatever its origin or foundation, had for some time been established and in the full exercise of the internal and external powers of government. It had been, as it long afterward continued to be, recognized as one of the family of states, and had maintained with them diplomatic relations. Such was its situation when the American vessels were tempted into its ports.

The Marquis di Circello for some time avoided making a formal reply to Mr. Pinkney's note. Indeed the latter was on his way to St. Petersburg when the reply was made. It was dated October 15, 1816, and passed him on his way. It was sent under cover to the Neapolitan minister at St. Petersburg, to be delivered at that place. Pinkney, learning that it was unfavorable, refused to receive it on the ground that his mission to Naples was ended; and it finally found its way to the United States through a copy handed to Mr. Gallatin, at Paris, by the Neapolitan ambassador at that place.<sup>1</sup>

After stating that the delay in replying to Mr. Pinkney's note was occasioned by an investigation of the subject of complaint, the note took the ground that the acts of "usurpers" could not be visited "upon the people subjected to their yoke, or upon the legitimate sovereigns." The true sovereign, it was argued, had "never ceased to be in a state of war with the usurper of his dominions," and he should not, on regaining his dominions in the course of the war, be "held responsible for the excesses of the enemy." Moreover, the nation was not responsible. If the inhabitants of the kingdom could have signified their wishes, they would have maintained relations of justice with the claimants. The nation itself was the victim of the usurper's acts. In fact the confiscations proceeded directly from the power and will of Bonaparte. There existed in the treasury a report of its minister to Murat, in relation to two American vessels seized under orders of sequestration emanating from "higher authority." In this report it was urged that the benefits from neutral commerce would greatly exceed the advantages to be derived from the confiscations of the vessels and their cargoes. Murat was then in Paris. The report was submitted to Napoleon, who indorsed on it an order that the

<sup>1</sup> Am. State Papers, For. Rel. IV. 169.

vessels should be confiscated, because the embargo in the United States led him to think that the cargoes must be British, and must have been introduced in violation of the Berlin and Milan decrees. When this order was received at Naples, it was decreed that the proceeds derived from the sales of the vessels and cargoes, as well as from the sale of licenses to trade, should constitute a separate and special fund. This fund was treated as a part of the "extraordinary and private domain" of Murat himself, and was used "to feed the caprices and the oriental pomp of the family of Murat and his adherents," and to defray "other licentious expenses of Murat and of his wife, especially during their visit to Paris." Murat was declared to be "but the passive instrument of the will of Bonaparte in the confiscation of the American ships."<sup>1</sup>

In 1825 and 1826 another but unsuccessful attempt  
 Appleton's Negotia- was made to obtain indemnity for the acts of the  
 tions. Murat government. Mr. John James Appleton was sent as special agent of the United States to Naples, with instructions to press the claims; but after some correspondence with the Chevalier de Medici, then minister for foreign affairs, in which the latter objected to entering into the subject on the ground that it would prejudice the position of France in respect of similar claims of the United States, Mr. Appleton was instructed that the President had decided to postpone the matter to a more propitious moment.<sup>2</sup>

Such a moment was believed to have arrived when  
 Renewal of Nego- Mr. Rives on the 4th of July 1831 concluded his con-  
 tiations. vention for the settlement of claims against France. This event was followed in the autumn by the dispatch of Mr. John Nelson as chargé d'affaires to Naples, with instructions to press the claims to a conclusion.<sup>3</sup> Mr. Nelson addressed his first note on the subject to the Prince of Cassaro, then minister for foreign affairs, on January 11, 1832, and another on the 27th of February.

The Prince replied at length on the 30th of May.  
 Note of the Prince of His argument proceeded on the same lines as that of  
 Cassaro. the Marquis di Circello, but with some elaborations and new illustrations. He contended that no indemnification was due to the American merchants, since they were wrong in confiding in Murat, whom they ought not to have viewed as the absolute, entire, and supreme possessor of the kingdom. Though Napoleon invested Murat on July 15, 1808, with the title of King of Naples, to which was added the dignity of High Admiral of France, the supreme sovereignty of Naples really resided in Napoleon, who in fact dictated the political relations of the country and ordered the enforcement of his decrees there. When a country is occupied by a foreign force, said the Prince of Cassaro, "a distinction should always be made between that force and the citizens of the country, who, being incapable of resistance, have unavoidably fallen under the power of the conqueror." Napoleon, with the wild idea of destroying the naval supremacy of Great Britain, claimed the right to dictate to all Europe; and Murat was merely his puppet. Moreover, Murat had no legitimate title. Apart from his investiture by Napoleon, he had no other

<sup>1</sup> Am. State Papers, For. Rel. IV. 169.

<sup>2</sup> S. Doc. 70, 22 Cong. 2 sess.

title than that of conquest, which must be followed by a treaty of peace with or entire submission of the sovereign dispossessed. Neither of these things took place. Ferdinand, the legitimate sovereign, constantly remained at war with Murat, and Americans who entered into contracts with the latter took the chances of war. Murat was like the robber who entered a man's house and stole its contents, which happened to include not merely the property of the owner of the house, but the property of a neighbor. Americans, though they knew the risk of trading to Europe at that time, persisted in doing so, preferring the hazard of losing their goods to having them rot on their hands. Should the Neapolitans or their king pay the penalty which the Americans thus incurred? The Neapolitans derived no benefit from the seizures, since the whole product went into the private purse of Murat. Naples groaned for ten years under the desolating continental system which occasioned the very evils for which the Americans required satisfaction. The kingdom was still loaded with taxes and debts caused by the violence and rapacity of the French. The principle that one government succeeding another was bound to fulfill the latter's engagements was, the Prince declared, inapplicable because the prince who recovers dominions to which he has never renounced the right can never be said to *succeed* the invader. Nevertheless, said the Prince, His Majesty, desirous of giving a proof of his delicacy and friendliness, had commanded that if any of the vessels that were seized should be found in the royal navy, it should instantly be returned or the value paid to the owner.

The significance of this offer was disclosed in Mr. Nelson's reply to the Prince's note. Maintaining the same positions as were advanced by Mr. Pinkney, Mr. Nelson said that the claims of the American Government involved three propositions: 1. That its citizens in 1809 were engaged in a lawful trade, and that their property was wrongfully seized and confiscated. 2. That the injuries thus inflicted proceeded from the government of the Neapolitan kingdom. 3. That the kingdom of Naples, having committed the wrongs, was bound to redress them; and that no change in its system of government, or in the persons of its rulers, could relieve it from this obligation. The truth of the first proposition had not been denied. The second and third were controverted.

In order to support the second proposition the United States did not, said Mr. Nelson, feel bound to maintain that the government of Murat was strictly legitimate. This question it considered to be immaterial. It limited itself to the assertion that the political affairs of the kingdom were at the period in question under the direction of an established government; that Murat was its king *de facto*, and that in the exercise of the powers of the established government the injuries complained of were committed. Ferdinand was driven from the throne of Naples in 1806, and sought refuge in Sicily, where he remained till 1815. In 1808 Murat was proclaimed king, and from that time till his expulsion in 1815 he exercised all the powers of royalty. His government was complete in all its departments. It was, with a single exception, recognized by the leading powers of Europe, and it performed all the international functions of government. It was not a mere military occupation. It was fixed, not temporary; civil, not military. Moreover, it was, in the view of the public law, independent. No matter how great was the influence of Napoleon, Naples

was governed as a separate kingdom. Even the act of Bayonne of July 15, 1808, by which the crown was settled on Murat and certain successors, confirmed the fact. It reserved no power to Napoleon. Neither the Berlin nor the Milan decree was *proprio vigore* of any effect in Naples. True, the kingdom may have submitted to the influence of France. But it did not appear that the American confiscations were due to this cause, or that they could be ascribed to anything else than the desire of Murat to supply his own needs, even at the expense of the nation's faith. But, conceding the existence of the imputed influence in the condemnation of American property, it could avail nothing. A government can not evade responsibility for its acts on the plea that it was influenced by a foreign power to do wrong. The decrees confiscating the American property were officially the acts of the Neapolitan government.

It having thus been shown that the acts complained of were the acts of the Neapolitan government, Mr. Nelson proceeded to discuss the question whether the responsibility for them had devolved on the subsisting government. In this relation he maintained that the acts of the rulers of a state, while engaged in the exercise of its sovereign powers, are the acts of the state itself; that the obligations incurred by such acts remain unaffected by changes in its actual government; and that whoever comes to the possession of its sovereign power, takes it subject to these obligations.<sup>1</sup> Whatever might be said as to the charge that the government of Murat was founded in usurpation, the nation remained the same, by whosoever it was governed; and it was with the nation, and not with its governor in his personal capacity, that the American merchants maintained their intercourse. With the question what was done with the proceeds of the confiscations, they had nothing to do. It was not their duty to suffer, because Murat may have abused his trust. In reality, however, a part of the proceeds was appropriated to public use. It was notorious that six or seven, or more, of the American vessels were immediately after their seizure devoted to the naval service of the Neapolitan government. "Some of these even now," said Mr. Nelson, "bear the flag of His Majesty Ferdinand the Second." And admitting that the rest were sold, as the Marquis di Circello had said, "to feed the caprices and the oriental pomp of the family of Murat and his adherents," the proceeds of the spoiliations inured to the relief of the Neapolitan people. If the American property had not been devoted to the royal household, the ordinary revenues would have been drawn on, or money would have been raised by charges on the resources of the country. By the provisions of the convention of Casa Lanza of May 20, 1815, and the royal proclamation of August 22 in the same year, the debts of Naples, part of which had been contracted during the incumbency of Murat, were guaranteed by the Neapolitan government. The obligation of the government was equally clear to indemnify those whose property was, by a kind of forced loan, converted, through the agency of the constituted authorities, to the purposes of the kingdom. Mr. Nelson also referred to the convention between France and other powers for the payment of losses inflicted by Napoleon,

<sup>1</sup> Mr. Nelson cited in support of these propositions Vattel, B. I. ch. 4, sec. 40; Book II, ch. 18, sec. 324; Book IV, ch. 5; also Pufendorf, Book VIII. ch. 12, secs. 2 and 3.)



as tending to show that the government of Naples was bound to make indemnity.

**Conclusion of a Convention.** After sending this note Mr. Nelson had numerous conferences with the Prince of Cassaro, but failing to reach any satisfactory conclusion, he at length demanded an explicit declaration whether the government would or would not grant the desired redress. Further conferences followed the demand, and various sums were offered by the Neapolitan government as an indemnity. On the 1st of October Mr. Nelson, deeming the sums that were offered insufficient, demanded his passports. They were sent to him on the following day, with a note stating that the Neapolitan government did not consider the negotiations at an end, and that a diplomatic agent would immediately be sent to the United States. On October 14, however, the matter was settled by Mr. Nelson himself, who on that day signed with the Prince of Cassaro a convention which was thought to be adequate for the satisfaction of all just and well-founded claims.

By this convention the King of the Two Sicilies' **Terms of Settlement.** agreed to pay to the United States 2,115,000 Neapolitan ducats.<sup>1</sup> Of this sum 7,679 ducats were set apart to reimburse the Government of the United States for expenses incurred in bringing home American seamen belonging to vessels that were confiscated at Naples in 1810. The rest of the fund was to be devoted by the Government of the United States, in such manner and according to such rules as it might prescribe, to the satisfaction of claims "for the depredations, sequestrations, confiscations, and destruction of the vessels and cargoes of merchants of the United States (and for every expense of every kind whatsoever incident to or growing out of the same) inflicted by Murat during the years 1809, 1810, 1811, and 1812." It was further agreed that the indemnity should be paid in nine equal annual installments of 235,000 ducats each, with interest at the rate of 4 per cent a year, to be calculated from the date of the exchange of the ratifications of the convention till the whole sum should be paid. The first installment was made payable twelve months after the exchange of ratifications. The exchange took place at Naples June 8, 1833.

**Modification as to Payment.** By an arrangement concluded at Washington December 26, 1835, on the proposal of the government of the Two Sicilies, and with the concurrence of the claimants, by Mr. Forsyth, Secretary of State of the United States, and the Chevalier Dominico Morelli, His Sicilian Majesty's consul-general, it was agreed that the balance of the indemnity remaining unpaid should be discharged by the payment in Naples on February 8, 1836, of the sum of 1,500,000 ducats. This arrangement was carried into effect. The whole fund yielded about 94 per cent of the total amount awarded to the claimants.<sup>2</sup>

**Establishment of a Commission.** By an act of Congress of March 2, 1833, provision was made for the appointment by the President, by and with the advice and consent of the Senate, of a board of three commissioners, whose duty it should be to receive and

<sup>1</sup> Equivalent to \$1,755,450, estimating a Neapolitan ducat at 83½ cents.

<sup>2</sup> S. Ex. Doc. 351, 25 Cong. 2 sess.

examine all claims presented to them under the convention of October 14, 1832, which were "provided for by the said convention, according to the provisions of the same and the principles of justice, equity, and the law of nations." It was further provided that the board should have a secretary, versed in the French and Italian languages, and a clerk, both to be appointed by the President, by and with the advice and consent of the Senate, and that the commissioners, secretary, and clerk should, before entering upon the duties of their offices, "take oath well and faithfully to perform the duties thereof." The members of the board were required to sit in Washington, and to terminate their duties within one year from the time of their first meeting. They were empowered to make rules and regulations. The Department of State was required to deliver to them all records and papers relating to the claims in question, and it was provided that, on the completion of their labors, all the records and papers of the commission should be deposited in the Department of State. The commissioners were required to report to the Secretary of State a list of all their awards, and it was made the duty of that official to transmit a certified copy of it to the Secretary of the Treasury. On receiving this list, the Secretary of the Treasury was directed to distribute in ratable proportions, among the persons in whose favor awards should have been made, such moneys as had been received into the Treasury for that purpose. The salary of the commissioners was fixed at \$3,000 a year, of the secretary at \$2,000, and of the clerk at \$1,500.<sup>1</sup>

To carry the convention and act into effect the President appointed as commissioners Wyllys Silliman, of Ohio, John R. Livingston, jr., of New York, and Joseph S. Cabot, of Massachusetts.<sup>2</sup> Thomas Swann, jr., of the District of Columbia, was appointed as secretary, and John W. Overton, of Kentucky, as clerk. The board appointed a messenger at a salary of \$500, as the Danish commission had done.

On September 18, 1833, the commissioners, the secretary, and the clerk qualified by taking the necessary oath before a justice of the peace of the District of Columbia, and the commissioners notified the Secretary of State of their readiness to proceed to business.<sup>3</sup> In reply the Secretary of State transmitted to them for their inspection the journal of the commissioners under the Florida treaty, as well as that of the Danish commission.

On September 19, 1833, the board adopted the following rules:

*"Ordered,* That all persons having claims under the convention between the United States and His Majesty the King of the Kingdom of the Two Sicilies, concluded at Naples on the fourteenth day of October one thousand eight hundred and thirty-two, which are to be received by the commissioners, do file a memorial of the same with the secretary of the board, to the end that they may hereafter be duly examined, and the validity and amount thereof decided upon, according to the merits of the several cases,

<sup>1</sup> 4 Stats. at L. 664.

<sup>2</sup> Mr. Cabot was appointed to fill a vacancy caused by the resignation of Peter V. Daniel, of Virginia, who was originally appointed a commissioner.

<sup>3</sup> They took the rooms that had lately been occupied by the commission under the convention with Denmark.

and the suitable and authentic testimony concerning them, which may hereafter be required. The said memorial must be addressed to this board. It must set forth, minutely and particularly, the various facts and circumstances whence the right to prefer such claim is derived; it must be verified also by the affidavit of the claimant.

"And in order that claimants may be informed of what is now considered by the commissioners as essential to be averred and established, before any such memorial can be received by this board, it is further

"Ordered, That each claimant shall declare in his said memorial, for and in behalf of whom the said claim is preferred; and whether the amount thereof, and of any part thereof, if allowed, does now, and at the time when the said claim arose did, belong solely and absolutely to the said claimant, or to any other, and if any other, what person. And in cases of claims preferred for the benefit of any other than the claimant, the memorial to be exhibited must further set forth when, why, and by what means, and for what consideration, such other has become entitled to the amount or any part of the amount of said claim.

"The memorial required to be exhibited by *all claimants*, must also set forth and certainly declare, whether the claimant as well as any other for whose benefit the claim is preferred, is now, and at the time when the said claim arose was, a citizen of the United States of America, where he is now, and at the time the said claim arose was, domiciliated; and if any, what change of domiciliation has since taken place.

"The said memorial must also set forth whether the claimant, or any other who may have been at any time entitled to the amount claimed, or any part thereof, hath ever received any, and if any, what sum of money, or other equivalent, or indemnification, by way of insurance or otherwise, for loss or injury sustained, satisfaction for which is therein asked. And if any such payment or indemnification has been made, to set forth when, and from whom, the same was received. And that time may be allowed to claimants to prepare and file the memorials above mentioned, it is further

"Ordered, That when the board shall close its present session, it adjourn to meet again on the third Wednesday in November next, at which time it will proceed to decide whether the memorials filed with the secretary are in conformity to the foregoing orders, and proper to be received for examination.

"Ordered, That the secretary of this board do cause three hundred copies of the above orders to be printed for the use of the claimants; and also that the publishers of the laws of the United States at Portland, in Maine; Portsmouth, in New Hampshire; Boston, in Massachusetts; Providence, in Rhode Island; Hartford, in Connecticut; New York, in the State of New York; Philadelphia, in Pennsylvania; Baltimore, in Maryland; Richmond, in Virginia; Raleigh, in North Carolina; Savannah, in Georgia; New Orleans, in Louisiana, and also the *Commercial Advertiser* in Salem, Massachusetts, be requested to publish this notice, three times a week, for three weeks."

The first session of the board closed with the adoption of the foregoing rules. An adjournment was then taken to the third Monday in November, in order to

afford time for the filing of memorials. The commissioners met again, pursuant to their adjournment, on the 20th of November. On the following day they authorized the secretary "to permit claimants or their agents to examine and, if needful, copy any papers in his possession; no paper, however, to be taken or copied out of the office of this commission." On November 26 it was—

"Ordered, That no memorial, document, or other paper, which may at any time have been deposited or filed in the office of the secretary of this board shall be withdrawn therefrom without an order from the board on a special application to be made for that purpose.

"All applications shall be submitted in writing addressed to this board; shall assign the reasons for the same, and be signed by the claimants on whose behalf they shall be made, or their representatives."

The second session of the board continued till the Orders of December 12, 12th of December 1833, when an adjournment was taken to the first Monday in the ensuing March. In 1833. adjourning the commissioners made the following orders:

"*Ordered*, That all persons having claims to be decided upon by this board, memorials of which claims have not yet been presented, or which, having been presented, have not been received by this board, do file original or supplemental memorials as the case may be, in their several claims, on or before the first Monday of March next; and that each of the said memorials shall be prepared and verified in conformity with the rules prescribed in the order of this board of the 19th of September last.

"*Ordered*, That all cases in which memorials have been received by the board be set down for examination after the expiration of four months from the date hereof; if, however, after the lapse of said time, any claimant shall show cause for not then entering upon the examination, a further time may be allowed.

"*Ordered*, That all cases where the claimants shall deem it necessary to take testimony in support of their claims, the said testimony, if taken within a district where commissioners have been appointed by a court of the United States to take affidavits, shall be taken before such commissioner; if no such commissioner, then before any officer qualified by law to administer an oath.

"*Ordered*, That all persons having claims under the convention between the United States and His Majesty the King of the Two Sicilies, be permitted to support their respective claims by the argument of counsel, but that every argument shall be submitted in writing and filed with the secretary of this board.

"*Ordered*, That the several claimants under the said convention be permitted to file objections, accompanied by arguments, in such cases as in the opinion of the remonstrants ought not to be favorably received; and no case shall be examined by the board until a reasonable time shall have elapsed, after the documents and proofs by which it may be supported shall have been filed, for preparing the necessary arguments and objections on the part of the remonstrants.

"*Ordered*, That when this board adjourn, it adjourn to meet on the first Monday of March next, at which time it will proceed to decide whether any memorial which may have been filed with the secretary prior to the said first Monday of March, in pursuance of the foregoing order, shall be received for examination.

"*Ordered*, That the foregoing resolutions of this board be published in all the papers designated in the order of the 19th of September last."

When the third session of the board began, on March 3, 1834, the state of the business was found to be such as to render an extension of time necessary. Two hundred and ninety-nine memorials had been presented, and it was probable that the number would reach 400. Nearly 200 were presented before the adjournment in December, and of these more than a half were suspended for want of material averments. Great delay had also been encountered by the claimants in obtaining proofs. Under the circumstances President Jackson recommended to Congress an extension of the term of the commission beyond the year originally allowed, which would expire on the 18th of September. By an act of June 19, 1834, an extension of six months was granted.<sup>1</sup>

<sup>1</sup>4 Stats. at L. 680.

Fourth and Fifth  
Sessions.

On the 29th of March 1834 the commission adjourned till the second Monday in May, on which day, the 12th of May, the fourth session opened. This session continued till the 23d of June, when the board adjourned to the first Monday in October. On the 6th of October the board reassembled pursuant to adjournment, for its fifth session, which continued till October 31, when an adjournment was taken to the third Wednesday in December.

## Sixth Session.

December 17, 1834, the board met for its sixth session, which continued till the close of the commission. On January 2, 1835, the claimants were ordered to present, as part of their proofs, a certificate of the collector of the port from which the vessels sailed of the quantity of merchandise shipped, the names of the shippers, and the amounts of the drawbacks allowed on the various articles.

On the 24th of January the board, having completed its examination of the various claims submitted, established and published the following principles to govern the making of its awards:

"Ordered, 1. That in cases of condemnation indemnity shall be made according to the actual value of the vessel and cargo, respectively, at the commencement of the voyage.

"2. That a commission of two and one-half per cent be allowed on the value of the cargo in full satisfaction for the purchase and charges thereon at the port of exportation.

"3. Freight according to the registered tonnage of the vessel at and after the rate of forty dollars per ton.

"4. All necessary expenses incurred at Naples by reason of illegal capture and condemnation to be allowed in full.

"5. Interest at the rate of 20 per cent on the amount awarded.

"As the board can not at this time ascertain whether the fund to be disbursed by them will or will not be sufficient to the payment of all the sums which shall be awarded by this commission, it is

"Ordered, That in each case such sums shall be awarded and reported, as the board shall believe would be justly payable were the fund adequate; and that if the fund shall not be sufficient to pay the aggregate amount allowed to all the claimants, a pro rata distribution shall be made in conformity with the provisions of the convention. It is further

"Ordered, That an entry be made on record of all the decisions made by the board up to this date."

In adopting the value of the vessel and cargo at the commencement of the voyage as a measure of damages, the commission seems to have acted from necessity. In a letter of June 10, 1833, to Mr. A. Davezac, chargé d'affaires of the United States at Naples, Mr. Alex. Hammett, who held the office of United States consul at that port during the period of the confiscations, and who still continued to hold it, declared that the value of each cargo as sold never could be obtained. Not only were papers destroyed, but by an arrangement between the custom-house and the buyers false weights were used, *bona fide* bidding was prevented, and vessels and cargoes were thus disposed of on terms previously agreed upon.<sup>1</sup>

In most of the cases before the commission there was little difficulty in determining whether the claimant was entitled to relief. As a rule, where the case appeared to be within the terms of the convention, the wrong was so flagrant as to leave little room for discussion. The principal argument appears to

<sup>1</sup> MSS. Dept. of State.

have been made in what were known as the pilchard cases, the circumstances of which were peculiar. Late in the year 1811 Mr. Alexander Köhly, a naturalized citizen of the United States, obtained from the government of Murat, through a Mr. Presteau, president of the Neapolitan chamber of commerce, six licenses for the importation into the kingdom of certain articles. The first article specified in the licenses was *salacche*, or pilchards, a product of the coast fisheries of England, which was much used by the people of Naples, especially in lent.<sup>1</sup> Mr. Köhly went with his licenses to England, where he induced Gordon, Murphy & Co., a London firm, to freight four American vessels—the *Horace*, *Concord*, *Boston*, and *Admittance*—with pilchards for Naples; and in order to carry out the plan without appearing to contravene the continental system, the vessels were furnished with false clearances, as if they were from the United States, though their registers and marine passes were genuine. But for some reason not disclosed the consummation of the scheme was defeated. On February 27, 1812, twenty days before the vessels arrived at Naples, the government organized an extraordinary commission to condemn them, and the vessels and their cargoes were in due time seized and detained. The extraordinary commission reported that it was the determination of the king to enforce the continental system; that it was notorious that the cargoes were the product of an English fishery and the property of English subjects; that the word *salacche* was not illegally inserted in the licenses, since the article might be made the subject of lawful commerce by being "neutralized;" and that the licenses, which enjoined an observance of the imperial decrees, had not been complied with, since the vessels had no certificates of origin of their cargoes. The most remarkable feature of this report is the manner in which it played fast and loose with the imperial decrees, so as to render the transaction in pilchards potentially lawful but actually unlawful. As the Berlin decree, which was reenacted at Naples in December 1806, declared all trade in English products to be unlawful, without regard to ownership, it did not permit such products to be "neutralized." It was for the purpose of preventing such "neutralization" that the certificate of origin, referred to in the report, was required; but to have required such a certificate in the present case would have been to proclaim the transaction inadmissible from the beginning. It is obvious that the design of the report was to justify the issuance of the licenses while condemning the vessels and cargoes, and condemnation was accordingly pronounced. Mr. Hammett succeeded, however, in saving the ships; but, though they were detained for a long time—the *Concord* till May 28, 1813—he was unable to obtain anything for freight, damage, or demurrage. Claims for these things were made before the Washington commission, and were fully discussed in the case of the *Concord*, in which the claim was prosecuted by Seth and Olive Storer, the administrators of the master, Seth Storer. While it appeared

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<sup>1</sup> In the argument before the commission it was stated and seems to have been conceded that the pilchard was "exclusively derived from the fisheries on the coast of England." In the Standard Dictionary it is stated that the *pilchard* is "common in the Mediterranean and on the Atlantic coast of Europe to the English Channel, and extensively taken in seines." The statement before the commission doubtless is to be understood in the sense that the pilchard, as an article of commerce, was, at least in the Neapolitan trade, supplied by the English fishing industries.

that Storer, after his return to England, obtained a verdict for a certain sum against Gordon, Murphy & Co., under the charter party, the main ground of objection was that the license constituted merely a contract with the Neapolitan Government, and that if it was violated by that government, to it alone must the injured party look for redress. It was contended not only that a breach of contract did not constitute a good ground of international claim, but also that the breach in question was not included in the "depredations, sequestrations, confiscations, and destruction" mentioned in the convention, and that the use of the false clearance was a fraud.<sup>1</sup> In reply it was denied that the claim was contractual in any proper sense. The license was not a contract, but a dispensation, and the act of the government was a confiscation. But even if it was considered as a breach of contract, this would not invalidate the claim, since a nation might "ask, urge, claim, in negotiations, many things the refusal of which is no cause for war."<sup>2</sup> As to the use of a false clearance, it was pointed out that the American courts attached no penalties to such an expedient during the existence of the Berlin and Milan decrees and the British orders in council; that such simulation of papers was in harmony with the design of the licenses, and was conformable to usage;<sup>3</sup> and that the American cases allowed freight to the neutral carrier of enemies' goods.<sup>4</sup>

The commission awarded the administrators of Captain Storer the sum of \$10,368.06.<sup>5</sup>

**Final Report.** The commission made about 275 separate awards, aggregating, with the addition of the 20 per cent interest allowed by the "principles" of January 24, 1835, the sum of \$1,925,034.68.<sup>6</sup> On March 17, 1835, having disposed of all the claims before them, the commissioners signed a report to the Secretary of State, and adjourned. Their report was as follows:

"[Office of the Commissioners to carry into effect the Convention with the King of the Two Sicilies.]

WASHINGTON, *March 17, 1835.*

"To the SECRETARY OF STATE.

"SIR: The undersigned Commissioners, citizens of the United States, appointed by the President by and with the advice and consent of the Senate, having performed the duties with which they were charged, under the Act to carry into effect the Convention made between the United States and the King of the Two Sicilies, concluded at Naples on the 14th

<sup>1</sup> The argument against the claim was made by David B. Ogden; in support of it, by Peleg Sprague and Asa Redington, jr.

<sup>2</sup> On the subject of contractual claims, Mr. Sprague cited *Am. State Papers*, For. Rel. I. 424; *Statement of Skipwith*, *Am. State Papers*, For. Rel. I. 749-754; *Instructions to Pinckney, Marshall, and Gerry*, *Am. State Papers*, For. Rel. II. 178; *Instructions to Ellsworth, Davie, and Murray*, *Am. State Papers*, For. Rel. II. 303; *Convention between the United States and France of April 17, 1800*, Art. V. and April 30, 1803, Art. I.; *Case of Beaumarchais*, *Ex. Doc. 147*, 22 Cong. 2 sess.; cases of Meade and others under the Florida treaty.

<sup>3</sup> *The Hendrick*, *Acton's Rep.* 322; *The Goede Hoop*, *Edward's Adm.* 327.

<sup>4</sup> *Wheaton*, 382; 3 *Wash. C. C.* 170, 484.

<sup>5</sup> *H. Doc. 242*, 24 Cong. 1 sess.

day of October 1832, beg leave to submit the following report of their proceedings:

"The undersigned having received their appointments from the President of the United States, assembled at the city of Washington, pursuant to notice from the Secretary of State, on the 18th day of September 1833, and having, together with the Secretary and Clerk to the Commission, taken oath well and faithfully to perform their several duties, organized as a Board in compliance with the Act aforesaid. On the following day a communication was transmitted to the Board from the Secretary of State, enclosing a certified copy of the Convention made with the King of the Two Sicilies; and at various times thereafter documents and other papers relating to claims were delivered to the Commission from the Department of State.

"The Board at this session established various preliminary orders and forms of proceeding; and in the first place an order was made whereby all persons having claims under the convention were required to file memorials of the same with the Secretary of the Board, in order that they might be examined and the validity and amount thereof decided upon according to the proper and authentic testimony by which they might be supported, which orders and those subsequently established were made public by means of newspapers and circulars distributed to those interested, under the direction of the Secretary.

"At the second session, held on the 20th November 1833, pursuant to adjournment and agreeably to notice given, the Board proceeded to examine such memorials as were filed with the Secretary at that time, and when they had disposed of the business before them, they adjourned to meet again on the 3rd March 1834, at which time they concluded the examination of all memorials in their possession which had not been previously acted upon.

"At this session a communication was sent to the Board on behalf of certain claimants interested to a large amount in the fund provided by the convention—representing that in consequence of the said claimants not having been able to procure from Naples necessary proofs and papers in order to prepare their several cases for examination, it would not be possible for them to comply with certain orders of the Board requiring that memorials should be filed within a specified time; and also stating that at least six months would be requisite to enable them to have their proofs forwarded from Naples. As the act creating the Commission limited its duration to one year, the Board discovered that unless it should be extended they would be constrained to exclude from a participation in the fund many citizens of the United States, for whose benefit the convention was made; they therefore determined to endorse a copy of the communication to the Secretary of State, in order that such measures might be adopted in relation thereto as should be deemed expedient; in consequence whereof a Law of Congress was passed on the 19th day of June 1834, by which the time limited for the duration of the Commission was prolonged six months—making the period for terminating the duties of the Board the 18th day of March 1835, instead of the 18th of September 1834. The Board are of opinion that this extension has enabled a large number of claimants to present and substantiate their cases, in whose favor awards have been made, who would otherwise have been deprived of all benefit from the Convention.

"After the Board had passed upon all the memorials and supplemental memorials that were presented, they proceeded to examine the testimony, and to pass upon the validity of the claims; and being very desirous to effect as just and equitable a distribution as possible, they made an order authorizing any claimant to file objections to the admission of other claims filed with the Secretary, and to support the same by written arguments and testimony; by this means the Board hoped to be aided in arriving at the truth and also in applying just principles to each case. They did not, however, derive as much advantage as was anticipated from this measure, owing principally to the fact that very few cases were presented to the Board which were not within the provisions of the Treaty, and that these exceptions were so clear as not to require argument to prevent their being allowed.



"With a view to urge claimants to diligence in preparing and presenting their cases, the Board from time to time passed various orders requiring all claims to be ready for examination and filed with the Secretary within a limited time, at the hazard of their being excluded; but in consequence of the great length of time that had elapsed since the losses were incurred, the death, removal or absence of parties interested or their representatives, and the consequent difficulty in procuring papers and proofs, it became absolutely necessary in order to do justice to the claimants, to grant them every possible indulgence consistent with a faithful discharge of duty; and the Board have the satisfaction to state, that every claim presented to them has received full and deliberate consideration.

"In consequence of the amount of the indemnity provided by the Convention not being sufficient to meet all just demands upon it, the Board were desirous that their awards should conform, as near as possible, to the fund to be distributed, and they therefore were compelled to resort to a different mode of liquidating the claims, than they would have adopted if the fund provided by the Convention had been sufficient to indemnify American citizens for all losses sustained by reason of the spoiliations committed; thus, in the valuation of the cargoes seized and confiscated at Naples, the Board awarded the value of the merchandise at the port of exportation in the United States, whereas in their opinion the actual loss sustained is the market value at Naples, which they are informed would be enhanced at least one hundred per cent beyond the amount allowed. For the same reason damages for detention were not awarded to the owners of vessels, which would, if allowed, have greatly increased the amount of the fund.

"Premium of insurance (which during the years embraced within the provisions of the Treaty averaged about 20 per cent) was not allowed, either to the underwriters or assured, in consequence of the inadequacy of the fund.

"The Board entertains a strong conviction that the application of these rules, under the circumstances, will operate justly and equally upon all classes of claims.

"Having thus given a concise statement of the proceedings of the Board, some of the principles established, and the reasons for adopting them, for a more detailed account of which they refer to the record of their proceedings, which shows with more accuracy the proceedings of the Board from the day of their organization to their final adjournment, they proceed to state the result of their labors.

"The gross amount awarded to the several claimants is \$1,925,034.68, making an average of the amount of the fund provided by the Treaty to be distributed in the proportion of about 94 $\frac{2}{3}$  per cent.

"The list of the awards made by the Board, following this report, will exhibit a full and distinct view of the actual amount awarded to each claimant.

"The Commissioners have directed the Secretary of the Board to cause to be deposited in the Department of State, the records, documents, and all other papers in their possession.

"Very respectfully submitted.

"WYLLYS SILLIMAN.

"JOHN R. LIVINGSTON, Jr.

"JOSEPH S. CABOT.

"The Board having now completed its adjustment of all the cases to be adjusted and decided upon by them, Order that the records of their proceedings, together with the vouchers and documents produced before them relative to said claims, be deposited in the Department of State of the United States, and as to morrow is the day limited by the Law, within which it was made the duty of the Board to receive and examine and decide upon the amount and validity of all the claims, the transactions of the said Board are now closed and the Board adjourned without day.

"Approved:

"W. SILLIMAN.

"JOHN R. LIVINGSTON.

"JOS. S. CABOT.

"Test:

"THOS. SWANN, Jr., *Secretary.*"



## CHAPTER H.

### THE PERUVIAN INDEMNITY: CONVENTION BETWEEN THE UNITED STATES AND PERU OF MARCH 17, 1841.

By a convention signed at Lima March 17, 1841, by  
**Claims Included.** James C. Pickett, chargé d'affaires of the United States, and Don Manuel del Rio, acting minister of the department of finance of Peru, the Peruvian Government agreed to pay to the United States the sum of 300,000 "hard dollars," of the same standard and value as those then coined at the mint at Lima, in full satisfaction of claims of the United States "on account of seizures, captures, detentions, sequestrations, and confiscations of their vessels, or for the damage and destruction of them, of their cargoes, or other property, at sea, and in the ports and territories of Peru, by order of said Government of Peru, or under its authority." This description of the claims to which the indemnity was to be applied was rendered still more restrictive by the stipulation that no other "payment or indemnification" should be demanded of the Government of Peru "on account of any claim of the citizens of the United States that was presented to it by Samuel Larned, esq., when chargé d'affaires of the United States near Peru," and that "the claims subsequent to those presented by Mr. Larned" should be "examined and acted upon hereafter." Thus the indemnity provided for by the convention was confined—

1. To claims on account of the seizure, damage, or destruction of property at sea or in the ports and territories of Peru, by order of the Peruvian Government or under its authority; and
2. To claims of that description which had been presented by Mr. Larned.

**Negotiation of the Convention.** Mr. Pickett, by whom the convention was signed on the part of the United States, reached his post at Lima June 30, 1839, but owing to the unsettled condition of affairs in Peru did not begin his negotiations for the settlement of claims till February 19, 1840. The claims which he was specially charged to press were those presented by Mr. Larned, one of his predecessors. They amounted, nominally, with interest, to \$1,200,000, of which sum the account for interest constituted about a half. In first presenting the claims Mr. Pickett offered to receive in full satisfaction of them the sum of \$400,000, or one-third of their nominal value, to be paid in eight annual installments of \$50,000 each, with interest at the rate of 6 per cent per annum, the first installment to be paid on the 1st of January 1842, and one on the first day of each succeeding year until the whole amount should be discharged. The sum which Mr. Pickett thus offered to accept was less than the nominal amount of a single claim—the claim for the ship *General Brown* and

cargo—which was estimated at \$600,000. After much negotiation Mr. Pickett on the 23d of January 1841 submitted a draft of a convention in which it was stipulated that Peru should pay \$300,000 in six equal annual installments of \$50,000, the first to be paid January 1, 1843, and all to bear interest at the rate of 4 per cent per annum from January 1, 1841, till paid. In making this proposition Mr. Pickett declared that it was final, and that he could not have been satisfied with so small a sum had not two of his predecessors in the legation offered to take it. The Peruvian Government, however, while closing with Mr. Pickett's offer to accept \$300,000, secured a modification of terms so as to make the indemnity payable in ten annual installments of \$30,000 each.

By Article VII. of the convention the ratifications were required to be exchanged within two years from the day of its signature, or sooner, if possible, after it had first been "approved by the President and Senate of the United States, and by the Congress of Peru." The Peruvian Congress failed to act upon the convention within the two years, and on October 21, 1845, more than four years after the date of signature, passed a law approving it with the condition that the first annual installment of \$30,000 on account of principal should be payable January 1, 1846, instead of January 1, 1844, as stipulated in the original instrument. This condition Mr. Buchanan, after consultation with some of the principal claimants, decided to accept; and the Senate of the United States gave its advice and consent. The interest remained payable on each installment from January 1, 1842. The ratifications were finally exchanged at Lima October 31, 1846.

In this relation it may be stated that the Peruvian Government in February 1847 paid to Mr. Albert G. Jewett, then the diplomatic representative of the United States at Lima, the first installment of \$30,000, but without interest, and at the same time asked the United States to consider that installment as having become due not on January 1, 1846, but on January 1, 1847. The ground of this request appeared to be that the ratifications of the convention were not exchanged till after January 1, 1846. The United States however replied not only that January 1, 1846, was the day fixed by the convention, but also that, according to the rules of international law, the convention was to be considered as binding upon the contracting parties from the date of its signature, unless it contained an express stipulation to the contrary<sup>1</sup>. The Department of State arranged that the installments as they became due should be received by Messrs. Edward McCall & Co., navy agents of the United States at Lima, and expended there for the use of the Navy; and that when an installment was so received the Secretary of the Navy should cause the same amount to be deposited in the Treasury of the United States for the use of the claimants. Repeated delays occurred in the payment of the indemnity, owing to the fact that the Peruvian Government had not the funds with which to make it.

By the first article of the convention it was provided that the indemnity should be "distributed among the claimants in the manner and according to the rules that shall be prescribed by the Government of the United States." In

<sup>1</sup> Mr Buchanan, Sec. of State, to Mr. Clay, United States minister at Lima, September 18, 1847, S. Ex. Doc. 58, 31 Cong. 1 sess.

execution of this stipulation Congress, by an act of August 8, 1846,<sup>1</sup> imposed the duty of adjudicating the claims on the Attorney-General, allowing him therefor the sum of \$2,000. An allowance of \$1,000 was made for a clerk to assist him. The Attorney-General was directed to adjudicate the claims in accordance with the principles of justice, equity, and the law of nations, and the stipulations of the convention; and was required to complete the task within a year from the passage of the act, and at the close of his labors to report a list of his awards to the Secretary of State, by whom a certified copy was to be transmitted to the Secretary of the Treasury. The Secretary of the Treasury was required to "cause the several installments, with the interest thereon, payable to the United States in virtue of the said convention, or the securities therefor, to be received from the republic of Peru and transmitted to the United States in such manner as he may deem best," and the net proceeds to be paid into the Treasury. These proceeds were appropriated to pay the awards.

August 13, 1846, Mr. John Y. Mason, then Attorney-General of the United States, took an oath before a justice of the peace of the District of Columbia well and faithfully to perform the duties prescribed by that act. He appointed Mr. John T. Reid, a clerk in his office, to act as clerk under the act. Mr. Reid took an oath of office similar to that of Mr. Mason.

On the day after his qualification for the performance of his special duties Mr. Mason, "having had under consideration the notice required to be given by him under the act, and the rules and regulations which it would be necessary to establish for carrying the convention and act into effect, determined on the following:"

"PERUVIAN INDEMNITY.

"ATTORNEY-GENERAL'S OFFICE,  
"Washington, August 14th, 1846.

"The Attorney-General of the United States having been authorized and empowered by an Act of Congress approved the eighth August instant, to adjudicate the claims arising under the Convention concluded between the United States and the Republic of Peru at Lima the 17 March 1841, hereby gives notice of his appointment to perform the duties confided to him by the said Act, and requires the claimants to present their claims, and the evidence sustaining them with all despatch, that he may proceed to execute the law.

"The claims provided for by the Convention are described in the first article as follows: 'The Peruvian Government, in order to make full satisfaction for various claims of citizens of the United States, on account of seizures, captures, detentions, sequestrations, and confiscations of their vessels, or for the damage and destruction of them, of their cargoes, or other property, at sea, and in the ports and territories of Peru, by order of said Government of Peru, or under its authority, has stipulated to pay the United States the sum of Three Hundred Thousand dollars, which shall be distributed among the claimants, in the manner and according to the rules that shall be prescribed by the Government of the United States.' And by the fifth article, it is stipulated: 'There shall not be demanded of the Government of Peru any other payment or indemnification, on account of any claim of the citizens of the United States, that was presented to it by Samuel Larned, Esqr., when Chargé D'Affaires of the United States near Peru. But the claims subsequent to those presented by Mr. Larned to the Government of Peru shall be examined and acted upon hereafter.'

<sup>1</sup> 9 Stats. at L. 80.

"And in pursuance of the authority and power given to the Attorney-General to make all needful rules and regulations for carrying the said Convention and Act into effect it is hereby,

"Ordered, That all persons having claims under the said Convention do file a memorial addressed to the Attorney-General, setting forth minutely and particularly the various facts and circumstances whence the right to prefer such claim is derived to the claimant, to be verified by his affidavit. The claimants shall also at the same time file the evidence sustaining their claims; and if any of the evidence be in Spanish a translation thereof shall also be filed.

"And in order that the claimants may be informed of what is considered essential to be set forth, averred and established, before their claims can be received and acted upon, it is further,

"Ordered, 1st. That each claimant shall declare in his memorial for and in behalf of whom the claim is preferred, and whether the amount thereof, and any part thereof, if allowed, does not, and, at the time when the said claim arose did, belong solely and absolutely to the claimant, or to any other person and if to any other than the claimant, the memorial to be filed shall further show and set forth when and by what means and for what consideration such other has become entitled to the amount or any part of the amount of said claim.

"2nd. That the memorial shall also set forth whether the claimant, as well as any other person for whose benefit the claim is preferred, is now and at the time when the said claim arose was a citizen of the United States, where he is now and at the time the said claim arose was domiciliated, and if any what change of domicile has since taken place.

"3rd. That the memorial shall also set forth whether the claimant or any other person who may have been at any time entitled to the amount claimed, or any part thereof, hath ever received any, and if any, what sum of money or other equivalent or indemnification by way of insurance or otherwise for loss or injury sustained, satisfaction for which is therein asked, and, if any such payment or indemnification has been made, to set forth when and from whom the same was received.

"4th. That the cases will be taken up for decision in the order in which they may be filed and docketed.

"J. Y. MASON,  
"Attorney General.

"Attest:

"JOHN T. REID, Clerk."

Mr. Mason further directed the clerk to cause a notice under the act to be inserted once a week for four weeks in the *Washington Union*, the *National Intelligencer*, the *Baltimore Argus*, the *Pennsylvanian*, the *New York Evening Post*, the *New York Courier and Inquirer*, and the *Boston Post*.

On the 15th of August 1846 Mr. Mason addressed a letter to Mr. Buchanan, notifying him that he had qualified under the act, and asking that the records, documents, and other papers in the Department of State relating to the claims be transmitted to him. To this letter Mr. Buchanan replied on the 25th of August. But before proceeding further in the matter Mr. Mason resigned the office of Attorney-General and was succeeded by Mr. Nathan Clifford, of Maine, who qualified under the act by taking an oath before a justice of the peace, October 20, 1846. Mr. Clifford ratified the appointment of Mr. Reid as clerk.

Disallowance of  
Interest.

The first award under the act of Congress was made July 19, 1847, in the case of the ship *Providence*, of Providence, Rhode Island. This was a claim for the detention of the ship, and for money extorted from the master by the

naval authorities of Peru. The sum extorted was \$3,000, upon which a premium of \$240 was claimed. The ship was detained six days, for which a charge of \$100 a day, or \$600, was made, constituting in all the principal sum of \$3,840. On this amount interest was asked from the date of the payment of the money, in March 1824, to November 1846, a period of twenty-two years seven months and fifteen days, at 6 per cent per annum, amounting to \$5,222.40. The Attorney-General awarded only the principal sum of \$3,840. In respect of the claim for interest he said: "The charge for interest is rejected, it being incompatible with the principles which appear to have been adopted by the two governments in concluding the convention." This decision, based upon the fact that the sum for which the claims were compromised covered only the amounts demanded as principal, was followed in all subsequent cases. So far as the action of the Attorney-General was concerned, it was a rule of necessity, not of law; and the same thing was practically true of the course of the governments of the United States and Peru in the settlement of the claims.

A case which came before the Attorney-General in

Case of the "*Esther*." more forms than any other was that of the ship *Esther*, of Boston, which was one of the claims on Mr. Larned's list. This ship, which was the property of John and Sullivan Dorr and David W. Child, citizens of the United States, was dispatched from Boston in December 1821, under the command of Frederick G. Low, master, with a cargo of merchandise to Valparaiso, in Chile. She arrived at her port of destination in March 1822; and in order to give the supercargo time to dispose of the goods to the best advantage, Captain Low chartered the ship to go from Valparaiso to Talcahuana, to take a cargo of wheat from thence to Callao, where she arrived in August 1822. At Callao Captain Low, in September 1822, chartered the ship to Eliphalet Smith and Henry D. Tracy, citizens of the United States, at the rate of \$2,000 per month and 5 per cent primage, to take on board partly at Callao and partly at Salinas a cargo of such goods as the charterers should think proper, and to proceed with it to one or more ports in Peru which she could lawfully enter, and deliver it to the agent of the charterers. It was expressly stipulated in the charter party that no articles contraband of war should be shipped, and it appeared by the list of articles composing the cargo that no such articles were taken on board. The ship performed her voyage and returned to Callao, where, on December 28, 1822, the day of her arrival, she was seized. A file of soldiers was put on board, some of the crew were imprisoned, and in May 1823 the ship was condemned and immediately fitted out as a ship of war. For the condemnation of the ship two reasons were assigned. The first was that she had cleared at Callao for Huacho and San Blas, and for no other ports, but that she afterward went to the port of San Carlos, in the island of Chiloe, which was then in the possession of Spain. No blockade of Chiloe had been declared either when she sailed for the island or when she arrived there. In the clearance delivered to Captain Low at Callao there was a clause notifying him of the blockade of ports between the parallels of 15° and 22° 30' south latitude; but Chiloe was not included in this notice, since it is situated in 40° or 41° south latitude. The first reason assigned for the condemnation was founded, as appears by a memorial of some of the interested parties of January 1823, on a claim of the Peruvian Government to forbid vessels

clearing out of its ports to trade with the enemy—a claim which it was in at least some cases sought to enforce by exacting a bond that the vessel would not go to an enemy's port or trade with the enemy. The claimants contended that this was not a valid ground of condemnation. "If," said the memorial in question, "the principle is established that neutrals may traffic with belligerents, those that may have entered the ports of either can not by any regulations of the port, in which they may chance to be, be deprived of that right \* \* \* In the case of the *Esther*, she has only resorted to an artifice to effect a legal purpose. By the laws in force in the ports of Peru, she could not clear directly for the ports in Spain; therefore, in conformity with the laws of Peru, she clears for some other destination—a thing of every day's practice among all nations—and then proceeds to one of the ports of the enemy, which she had an undoubted right to do, and which right no laws of Peru could take away from her."<sup>1</sup>

The second ground alleged for the condemnation of the ship was that she carried a passenger from Chiloe and landed him at one of the intermediate ports between Chiloe and Lima, and that this passenger was a spy with dispatches for the Spanish forces. The claimants submitted depositions to show that the passenger in question was a grocer at Chiloe; that he paid but a small sum for his passage; that he was represented to the captain as going on a mercantile voyage; and that he was "landed in open day by the ship's boat at the intermediate port of Rescadores, the ship lying to waiting the return of the boat, four leagues from the shore, so that had the port been blockaded the ship did not approach near enough to violate it." Among the papers presented by the claimants was a copy of the instructions of the owners to the master of the ship, showing their intention to have the voyage conducted in perfect good faith and to permit no violation of any law whatever.

The owners made the following claim:

1. Value of the ship at the time of seizure.....	\$25,000.00	
2. Amount of charter party to Smith and Tracy earned, but not paid in consequence of the seizure and condemnation, 4 mos. at \$2,000 per month .....	\$8,000.00	
Primage at 5 per cent .....	400.00	
		8,400.00
3. Amount due for demurrage by the seizure of the ship from Jan. 1, 1823 to May 8, 1823, four months and seven days, at \$2,000 per month .....	\$8,466.69	
Primage at 5 per cent .....	423.34	
		8,890.03
4. Amount of disbursements after seizure .....		1,272.12
5. Amount of wages to crew .....		842.65
6. Amount of loss of freight to the U. S. in consequence of seizure, being amount earned on former voyage from Valparaiso to Baltimore .....		15,000.00
7. Wages of master, while awaiting trial .....		496.33

<sup>1</sup>The memorial, in further support of this position, said: "The fact of false clearance was never heard of as the cause of the condemnation of a ship \* \* \*. It is well known that almost all the vessels from the United States, which proceed around the Horn, are cleared out for the northwest coast, although their actual destination is Valparaiso or Lima."



8. Master's board and other expenses from Dec. 28, 1822 to May 7, 1833, while ship was under seizure .....	\$500. 00
9. Amount paid for Master's passage home.....	250. 00
10. Amount paid for translating Spanish documents .....	63. 75
	<hr/>
	60, 714. 88
Interest on the above at 6 per cent from May 7, 1823, to May 7th, 1841, 18 years.....	65, 572. 07
	<hr/>
	126, 286. 95
Deduct amount received from Smith and Tracy \$4,426.32 and interest at 6 per cent for 10 years 4 mos. and 3 days, \$2,746.33.	7, 172. 65
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	119, 114. 30

The Attorney-General awarded the sum of \$28,111.10, being the whole of items 1, 4, 5, 7, and 9, and one-half of item 8. In regard to the other items he said:

"So much of the second item as relates to the amount of the charter party to Smith and Tracy, earned but not paid in consequence of the seizure, is rejected, it appearing that the owners sued Smith and Tracy and recovered from them, prior to the date of the convention. If any claim on this account is valid against this fund, it is clearly due to Smith and Tracy, or one of them, and not to these parties. The residue of said item for primage is also rejected, it appearing that this charge was compromised with the principal claim in the suit between the owners and Smith and Tracy. These parties having elected their remedy and adjusted their whole claim, it would be inequitable to allow them a *pro rata* share of this indemnity. The third item for demurrage after seizure of the ship is also rejected, it being inconsistent in principle with the claim already allowed these parties for the value of the ship. It was their unquestionable right to insist that the value of the vessel should be estimated according to its worth at the time it was seized; they were then divested of their property. It is not a satisfactory answer to this to say that the Peruvian Government has in this case confessed the injustice of the proceeding; if it were so the claim for demurrage might be extended indefinitely even to the date of the convention. The admission on their part only confirms the right to compensation to the extent of the loss sustained, but it cannot change the character or the legal effect of the judgment previously rendered. The charge for primage is rejected, as the principal sum is not admitted. The sixth item for loss of freight not earned falls clearly within the rule of speculative damages and is therefore inadmissible. No allowance can be made for prospective profits or speculative damages in any case. The tenth item for translating Spanish documents is rejected in pursuance of the rule adopted throughout, requiring the parties in all cases to furnish their own proof. The charge for interest is rejected for the reason assigned in the award in the case of the ship *Providence*.

"NATHAN CLIFFORD,  
"Attorney-General."

The cargo as well as the ship was condemned; and claims were allowed on account of the condemnation of the cargo, as follows:

To Samuel F. Tracy, assignee of Henry D. Tracy, in his own right and as surviving partner of Stiphale & Smith, and also as assignee of Captain Low, and of Stephen B. Howe, supercargo, the sum of \$19,654.39 was awarded, including items for the value of the cargo, for freight, and for advances and expenses of defending the property in Peru. These items were allowed on the basis of actual loss. An item for \$10,000 for damages to mercantile credit, for the breaking up of commercial transactions, and

for false imprisonment, was rejected, the first two constituents as "speculative," and the third (false imprisonment) as "not embraced within the terms of the convention."

To Henry Farnam, administrator of the estate of Eliphalet Smith, the sum of \$13,146.27 was allowed, for his interest in the cargo and for money paid by him for freight. Items for expenses incurred in defending suits on the charter party in which the owners of the ship recovered were rejected, the Attorney-General saying: "It was the party's own fault to delay the payment and incur the expenses of a lawsuit in resisting a legal demand."

Edward Sharp, as administrator of the estate of Stephen B. Howe, supercargo, made the following claim:

1. For loss of his proportion of the cargo shipped by Smith and Tracy, and purchased of them by said Howe, on the 14th of September 1822 .....	\$3, 092. 29
2. The loss of the articles shipped by him on board said vessel on his own account at San Carlos, 4 December 1822 .....	562. 56
3. Commission on outward cargo sold by Howe at San Carlos, to wit, 5 per cent on \$25,836.87½ .....	1, 291. 84
4. Commission on return cargo purchased by Howe at San Carlos, to wit, 2½ per cent on \$26,899.62 .....	672. 43
5. Commission on return cargo for conducting same to a market in Callao, to wit, 5 per cent on \$26,899.62 .....	1, 344. 96
	<hr/>
	6, 964. 10

"Interest thereon"

On this claim the Attorney General rendered the following award:

Regarding the first item as overcharged, I have reduced the amount to conform with the allowances made in the other cases, relating to this ship and allow .....	\$3, 000. 00
And the second item is allowed .....	562. 56
	<hr/>
	3, 562. 56

"The third, fourth and fifth items are rejected, deeming it more consonant with justice and equity, among the respective claimants, to limit their several claims to their actual loss, rejecting all charges for prospective profits and speculative damages. The claim for interest is rejected for the reason assigned in the award in the case of the ship *Providence*."

The "overcharge" in the first item was due to the failure of the claimant in estimating the value of the cargo to deduct the amount of duties payable on it.

The sum of \$1,584.07 was allowed to certain underwriters for money paid on a part of the cargo of the vessel, and the further sum of \$843.28 was awarded to Captain Low for the loss of a personal adventure.

The whole amount allowed on the claim was \$66,901.67.

In the case of the ship *General Brown*, to which reference has heretofore been made, the sum of \$454,091.18 was claimed, with interest, on account of the wrongful

confiscation of the vessel and cargo. The claim included items not only for the value of the ship and cargo, and for freight, but also for the loss of profits on the voyage. The Attorney-General allowed: For the value of the vessel, \$40,000; for the value of the cargo at the time and place of seizure, \$139,036; for freight earned on the cargo prior to its seizure, \$14,000; for the return of the crew and for the expenses of legal proceedings in Peru, \$8,732.18; total, \$201,768.18.

# THE PERUVIAN INDEMNITY.

4599

In the case of the ship *Friendship*, of Salem, the memorial set forth the following claims:

Case of the Ship	
"Friendship."	
1. Detention for 36 days, \$100 a day .....	\$3, 600
2. Interest on property during detention .....	600
3. Injury to ship .....	400
4. Interruption of voyage .....	10, 000
5. Goods sequestered on shore .....	9, 000
	<hr/>
	23, 600
6. Interest on above .....	33, 160
	<hr/>
	56, 760

The Attorney-General allowed the sum of \$4,000, the whole of the first and third items. The item for interest was rejected for the reasons stated in the case of the *Providence*. The fourth item, for the interruption of the voyage, was rejected "for the reason that it was not embraced in the terms of the convention, and is excluded by the rules prescribed by Congress in the first section of the act of the 8th August 1846 for the adjudication of these claims." The fifth item was disallowed, "there being no proof to sustain the charge. No goods were sequestered by the Government of Peru." An additional claim for the sequestration of \$600 in money was allowed.

A special claim, which was made and rejected, is stated in the following opinion:

## "PERUVIAN COMMISSION.

"ATTORNEY-GENERAL'S OFFICE, 29th July 1847.

"Special claim for damages resulting to mercantile establishment and credit, from an illegal arrest, and expenses incurred in defense of person and property.

"Claimant: Samuel F. Tracy, of New York, assignee of Henry D. Tracy.

"Memorial filed 19 April 1847.

"The memorial alleges 'that in April 1823 the ship *Friendship*, of Salem, Richard Meek, master, arrived as Callao (Peru), consigned to said Henry D. Tracy, who after disposing of her cargo and placing on board a return cargo, including twenty thousand dollars in silver coin, on which coin he had regularly paid before shipment the current legal export duty of five per cent, and when the ship had obtained a clearance and was in the act of leaving the port on her voyage, to wit, on the 26th April 1823, she was seized by the authorities of the port, on the false allegation that she had on board a much larger amount of coin than twenty thousand dollars, and that it was attempted to defraud the revenue out of the export duty on the excess beyond the twenty thousand dollars, so cleared out. That the ship was thereupon taken forcible possession of, by a military officer and twenty-five soldiers, and conveyed to the inner harbor, when the cargo was discharged, together with the twenty thousand dollars, and six hundred dollars additional which belonged to the captain and supercargo of the ship for her and their private use. That the captain of the ship was forthwith sent to prison, there kept for eleven days, during which period the said seizers were employed in searching the ship by wantonly breaking up the cabin ceiling and other woodwork, desks, chests, etc., but found no other coin nor other suspicious goods than said twenty thousand dollars, and six hundred dollars, twenty thousand dollars whereof were restored to the ship on the 12th of May following, and the balance of six hundred dollars was retained by the authorities for further trial, which was subsequently ordered to be paid to the said Henry D. Tracy, after the

ship had sailed, but was not paid in consequence of the government having used the money for its own purposes.'

"The above outline of events that occurred at Callao appears to be recited in the memorial merely by way of inducement to the statement of the injuries complained of in this case. No claim is made for the seizure or damages to the ship. The property of the ship was in other claimants, who are allowed for the detention and injury. No claim is made for the the coin; the twenty thousand dollars were returned and the six hundred dollars has been awarded to the rightful owner.

"After reciting the facts in the manner above mentioned, the memorialist proceeds to state the grounds of his claim, for remuneration out of the indemnity stipulated in the convention of the 17th March 1841. The following is an exhibit of the amount claimed and of the several items thereof as appears by the schedule annexed to the memorial of the claimant on file:

For damages sustained resulting from illegal arrest of Henry D. Tracy to his mercantile establishment and credit as set forth in the memorial hereto annexed.....	\$25, 000. 00
For sundry expenses incurred in his defense and in defense of his property .....	1, 500. 00
For interest in \$26,500 from 12 May, 1823 to 29 March 1847 at 6 per cent .....	37, 987. 75
For cost of proof and translation .....	250. 00
	<hr/>
	64, 737. 75

"Having examined the memorial in this case, and the records, documents and all other papers transmitted from the State Department relating thereto, and having heard the evidence offered by the claimant in support of the claim, and maturely considered the same, I do hereby adjudicate and determine, that no part of said claim is embraced within the terms of the convention of the 17th March 1841, and that the whole claim be and the same is hereby rejected.

"The sum of three hundred thousand dollars was stipulated to be paid by the Government of Peru, in order to make full satisfaction for various claims of citizens of the United States on account of seizures, captures, detentions, sequestrations and confiscations of their vessels, or for the damages or destruction of them, of their cargoes, or other property at sea or in the ports and territories of Peru. It is not alleged or pretended that the mercantile establishment of Henry D. Tracy was seized by the order of the Government of Peru. There was no seizure, and it is very clear that consequential damages altogether imaginary cannot be allowed. No claim is made directly for the false imprisonment, doubtless for the obvious reason that none such is provided for in the convention.

"NATHAN CLIFFORD, *Attorney-General.*"

"Attest:

"JOHN T. REID, *Clerk.*"

In the case of the brig *Elizabeth Ann*, Thomas Dunlap, assignee of Perit & Cabox, claimed: (1) For loss on the sale of the brig, through deterioration, loss of tackle, etc., occasioned by her unlawful detention, \$3,000; (2) money paid by the master to the charterer, in consequence of the brig's inability to proceed to Guayaquil owing to her detention, \$1,100; (3) the estimated loss of homeward freight, owing to the damaged condition of the brig, \$3,000; (4) expenses incurred in going to Iquique and Tarapaca to receive part of the price of the brig when sold, \$315.50; (5) expenses incurred in a lawsuit (representing presents for three judges and the fiscal, \$850; treasurer of the custom-house, \$425; a horse given to General Valero, \$250;

saddle and bridle for the same, \$130), \$1,655; (6) board and horse hire of the master while attending trial, \$290; (7) medical attendance on the master, \$200.25; (8) passage and stores of the master to Arica homeward, \$112.50; (9) passage, freight, and stores of the master to Philadelphia, \$448; total, \$10,121.25.

The Attorney-General allowed the sum of \$3,950.50, which included \$2,000 on the first item for deterioration and injury of the vessel and loss of tackle by the detention; the whole of the second item, it appearing that the money was actually paid to the charterer; the sixth item, for board of the master, and the eighth and ninth items, for the passage of the captain, it being necessary for him to return after the sale, the vessel having become unseaworthy by the detention. The allowance on the first item was for loss arising from the "direct injury" to the vessel, the residue being rejected on the ground that it fell "within the rules of speculative damages." The third item, for freight not earned, was declared to be "clearly inadmissible for the same reason." The fourth item, for the expenses of a journey to receive part of the price of the brig, was considered "too remote to be taken into the account." The fifth item, for presents to the judges and other officials, was rejected as "wholly inadmissible. No allowance can be made for bribes." The seventh item, for medical attendance, was rejected as falling "within the rule of speculative damages."

Another claim in the case of the *Elizabeth Ann*, made by Joseph A. Clay, administrator of the estate of Charles G. Swett, for loss of cargo by reason of the detention, was allowed to the amount of \$4,435.56. This allowance included an item of \$1,885 for the value of the goods; of \$1,750 for demurrage paid to the master in cash; of \$620.56 paid to the master for expenses; and of expenses of board, etc., during the detention.

Case of the Ship  
"Catharine."

In the case of the Bremen ship *Catharine* the claimants demanded (1) \$1,575, the amount of export duty paid to the Colombian Government on a quantity of cocoa shipped on that vessel at a Colombian port, and afterward exacted by the Peruvians again, on their entering into possession of the port; and (2) \$700 for demurrage alleged to have been paid by the owners of the ship in consequence of the detention caused by the above-mentioned incident. The Attorney-General allowed the first item. The second he rejected for want of evidence that the demurrage was paid, or that any claim for it was enforced.

The Schooner "Henry,"  
and other Cases.

In the case of the schooner *Henry*, which was a claim for the unlawful detention of the vessel, Samuel F. Tracy, as assignee of Henry D. Tracy, demanded: (1) For the value of two brass cannon and their carriages, taken by the captors, \$400; (2) for a boat and oars taken at Callao, \$200; (3) for money expended in defending the property, \$2,000; (4) for money expended in releasing the master from prison, \$200; (5) for loss of the master's services while in prison, \$200; (6) for loss of profits in the exchange of the cargo at Pisco, and for breaking up the voyage, \$5,000; (7) for demurrage, and support of the officers and crew during four months, \$6,000; (8) interest, \$20,659.33; (9) cost of preparing proofs and translations, \$200; total, \$34,859.33. The Attorney-General allowed the sum of \$8,800, being the whole of items 1, 2, 3, 4, and 7. The fifth item, for loss of the master's

services, and the sixth, for loss of profits and for the breaking up of the voyage, were disallowed, as not being within the terms of the convention. No allowance was made for the preparation of proofs and translations, or for interest.

The principles applied in this and the preceding cases were also applied in the cases of the ship *Flying Fish* and the schooner *Wasp*, in which claims for unearned freight, for interest, and for the expenses of preparing proofs and translations were rejected, only the actual losses and costs in Peru being allowed.

In the case of the bark *Peru*, of Salem, the claim was composed of the following items: (1) Detention and sequestration of the bark for the transportation of 335 soldiers, say at \$10 a head, \$3,350; (2) articles stolen by the soldiers, \$708.62½; (3) damages to the ship and detention for repairing them, \$300. From the aggregate of these items the claimant deducted the sum of \$1,641.75, realized from the sale of a Peruvian draft for \$2,512.50, leaving as the whole amount claimed, exclusive of interest, the sum of \$2,716.87½. The Attorney-General allowed the sum of \$1,008.63, being the whole of the second and third items. The first item was disallowed for the reason that it appeared that the charge had been made the subject of a settlement between the agent of the claimant and the Peruvian Government two years before the date of Mr. Larned's note to the minister for foreign affairs.

In the case of the ship *China*, of Salem, the claimants demanded: (1) For wrongfully causing the ship to deviate from her intended voyage, resulting in her detention from February 25 to March 3, 1824, six days, at \$100 a day, \$600; (2) for damages done the *China* by a 24-pound shot fired into her, \$500; (3) for damage done to the cargo by the shot, \$1,610. The Attorney-General allowed the sum of \$2,710, being the whole claim, exclusive of interest.

The schooner *Robinson Crusoe* and her cargo were seized and appropriated by Admiral Guise, of the Peruvian navy, without legal adjudication, and were destroyed while in his possession. The sum of \$10,000 was allowed, the actual value of the vessel and cargo.

A claim was allowed in favor of Samuel F. Tracy, assignee of Henry D. Tracy, for the seizure on land of naval stores, furniture, and other property, which were guaranteed by the capitulation of Lima, but were seized by the Peruvian authorities in violation thereof.

We have narrated elsewhere the history of the claim against Chile growing out of the seizure by Lord Cochrane, in the valley of Sitana, Peru, in May 1821, of a sum of money, the proceeds of the sale at Tacna of a part of the cargo of the American brig *Macedonian*.<sup>1</sup> At that time the greater part of the cargo remained unsold, and the master of the brig, Eliphalet Smith, was on his way to Arequipa with a view to dispose of the residue. In July 1821 the combined forces of Chile and Buenos Ayres, under General San Martin, obtained possession of Lima and established there a provisional government. In December of the same year Captain Smith, having found a part of his cargo unsalable at Arequipa, sent it under convoy to Lima, in charge of Stephen B. Howe, his nephew, with orders to consign it for sale to Abadia & Arismendi, his usual commission merchants, if that house continued to exist, and if not, to some other suitable consignee. It turned

<sup>1</sup> *Supra*, 1449.

out that the house had not only been broken up, but that its members, in consequence of their connection with the old government and adherence to its cause, had fallen under the displeasure of the new government, and after being imprisoned were either compelled or voluntarily chose to depart from the country, and that their property was decreed to be confiscated to the use of the state. The *Macedonian* and her cargo were consequently consigned by Howe to the English house of John Thwaites. The government at Lima, however, instituted proceedings against the brig and her cargo and such of the proceeds as were in the hands of Mr. Thwaites, as the property of the Spanish refugee Arismendi, and upon that ground condemned the whole to the use of the state.

The Attorney-General held that the vessel and cargo were American property, and awarded for the vessel the sum of \$32,193.63, and for the cargo the sum of \$59,093.87; total, \$91,287.50. This sum was made up of five items: (1) Value of the brig, \$25,000; (2) money paid to the officers and crew, \$7,193.63; (3) actual value of the confiscated cargo at the time and place of seizure, \$47,440.75; (4) debts confiscated to the use of the government, \$6,167; (5) a particular and separate part of the cargo, \$5,486.12. "The residue of the claim not already allowed (except the charge for interest) is," said the Attorney-General, "rejected, in accordance with the principle which I have adopted throughout limiting the claims of the respective parties to the actual loss sustained, excluding prospective profits dependent upon the chances of business and the uncertain state of the markets, regarding all such charges as falling within the rule of speculative damages. This rule is uniformly adhered to by courts of law in the investigation of similar cases and in my judgment it is entirely consonant with justice and equity among the respective claimants, to apply it in adjudicating these claims. The charge for interest is rejected for the reason assigned in the award in the case of the ship *Providence*."

It has been seen that by the terms of the convention the indemnity was intended to apply only to claims growing out of the acts of the Peruvian authorities.

In the case of the schooner *Rampart* a claim was made for the seizure and detention of the vessel and for damage done her in a hostile attack, and for various articles plundered from the ship and cargo, amounting in the whole to the sum of \$8,008. The claim was dismissed on the ground (1) that it was not "included in Mr. Larned's list presented to the Government of Peru," and (2) that the evidence showed "that the injuries complained of were committed by the Spanish authorities in Callao."

In conformity with the provision of the act of Congress, requiring the Attorney-General at the close of his commission to report a list of his awards to the Secretary of State, Attorney-General Clifford on August 7, 1847, transmitted to the Department of State the following paper:

#### "PERUVIAN INDEMNITY.

"ATTORNEY-GENERAL'S OFFICE,

"7 August 1847.

"List of Awards made by the Attorney-General of the United States under the Act of Congress, approved 8th August 1846, to carry into effect the Convention between the United States and the Republic of Peru, concluded at Lima, the 17th day of March 1841.

## "Claims allowed.

"To Edward Carrington of Providence, Administrator of Edward Carrington, for detention of the ship <i>Providence</i> , of Providence, and money extorted from the master, the sum of three thousand eight hundred and forty dollars.....	\$3,840.00
"To Francis Peabody and George Peabody of Salem and John L. Gardner of Boston, Executors of Joseph Peabody, and Tucker Saland, of Salem, Administrator of J. Augustus Peabody, for detention and damage done the ship <i>China</i> of Salem and her cargo, the sum of two thousand seven hundred and ten dollars.....	2,710.00
"To Stephen C. Phillips of Salem for articles stolen from and damage done to the barque <i>Peru</i> of Salem, the sum of one thousand and eight dollars and sixty-three cents .....	1,008.63
"To George Nichols of Salem in his own right and as administrator of Jerathmeel Pierce and Ichabod Nichols, Lydia R. Pierce of Salem, administratrix of Benjamin Pierce, Charles Sanders of West Cambridge and Henry Pierce of Salem, for detention of the brig <i>Herald</i> of Salem and money extorted from the master, the sum of two thousand six hundred and ten dollars.....	2,610.00
"To George Nichols of Salem in his own right and as administrator of Jerathmeel Pierce and Ichabod Nichols, Lydia R. Pierce of Salem, administratrix of Benjamin Pierce, Charles Sanders of West Cambridge, Henry Pierce of Salem and Benjamin R. Nichols of Boston, for detention and injury to the ship <i>Friendship</i> of Salem, the sum of four thousand dollars.....	4,000.00
"To George Nichols of Salem, administrator of Ichabod Nichols and Richard Meek of Marblehead, for money sequestered from the ship <i>Friendship</i> of Salem, the sum of six hundred dollars.....	600.00
"To Aimee E. Alsop, executrix, and John Sergeant and Gustavus Cleeman of Philadelphia, executors of Richard Alsop, for and to the use of his estate, and in trust for Edward L. Scott, and John Huan or their legal representatives for the capture and destruction of the schooner <i>Robinson Crusoe</i> and cargo, the sum of ten thousand dollars.....	10,000.00
"To Caleb Loring, Thomas B. Wales and Samuel Appleton of Boston, Philo S. Shelton of Boston, executor of Benjamin P. Hamer, Paschael Paoli Pope of Boston, administrator of William H. Boardman, and Titus Wells of Boston, executor of Abraham Touro, underwriters for part of the cargo of the ship <i>Esther</i> of Boston, confiscated, the sum of one thousand five hundred and eighty-four dollars and seven cents .....	1,584.07
"To John Dorr of Boston and Sullivan Dorr of Providence in their own right and in trust for the estate of D. W. Child of Boston, deceased, for confiscation of the ship <i>Esther</i> of Boston, the sum of twenty-eight thousand one hundred and eleven dollars and ten cents.....	28,111.10
"To Samuel F. Tracy of New York, assignee of Henry D. Tracy for himself and in trust for others according to the said Henry D. Tracy's deed, or instrument of assignment on file, for confiscation of part of the cargo of the ship <i>Esther</i> of Boston the sum of nineteen thousand six hundred and fifty-four dollars and thirty-nine cents .....	19,654.39
"To Samuel F. Tracy of New York assignee of Henry D. Tracy for himself and in trust for others according to the terms of the said Henry D. Tracy's deed or instrument of assignment on file, for detention of schooner <i>Wasp</i> , the sum of eight hundred dollars.....	800.00



"To Samuel F. Tracy of New York, assignee of Henry D. Tracy for himself and in trust for others according to the terms of said Henry D. Tracy's deed or instrument of assignment on file, for detention of the ship <i>Flying Fish</i> , the sum of six thousand one hundred and thirty-six dollars .....	\$6, 136. 00
"To Samuel F. Tracy of New York, assignee of Henry D. Tracy for himself and in trust for others, according to the term of the said Henry D. Tracy's deed or instrument of assignment on file, for detention of the schooner <i>Henry</i> , etc., the sum of eight thousand eight hundred dollars .....	8, 800. 00
"To Samuel F. Tracy, assignee of Henry D. Tracy for himself and in trust for others, according to the terms of the said Henry D. Tracy's deed or instrument of assignment on file, for seizure of naval stores, etc., the sum of three thousand eight hundred and twenty-seven dollars and fifty cents .....	3, 827. 50
"To Frederick G. Low of Gloucester for confiscation of part of the cargo of the ship <i>Esther</i> , of Boston, the sum of eight hundred and forty-three dollars and twenty-eight cents .....	843. 28
"To Porter Harmony of New York for confiscation of the ship <i>General Brown</i> of New York and cargo, the sum of one hundred and twenty-four thousand six hundred and sixty-eight dollars and seventy-four cents .....	124, 668. 74
"To George C. De Kay, County of Hudson, New Jersey, assignee of the executors of Henry Eckford, for confiscation of the ship <i>General Brown</i> of New York and cargo, the sum of sixty-nine thousand eight hundred and ninety-nine dollars and fifty-four cents .....	69, 899. 54
"To G. G. & S. S. Howland of New York, for confiscation of the ship <i>General Brown</i> of New York and cargo, the sum of seven thousand one hundred and ninety-nine dollars and ninety cents .....	7, 199. 90
"To William Wheelwright for duties illegally extorted the sum of fifteen hundred and seventy-five dollars .....	1, 575. 00
"To Henry Farnam of Boston, administrator of Eliphalet Smith, for confiscation of part of the cargo of the ship <i>Esther</i> of Boston, the sum of thirteen thousand one hundred and forty-six dollars and twenty-seven cents .....	13, 146. 27
"To Edward Sharp of Dorchester, administrator of Stephen B. Howe, for confiscation of part of the cargo of the ship <i>Esther</i> of Boston, the sum of three thousand five hundred and sixty-two dollars and fifty-six cents .....	3, 562. 56
"To Thomas Dunlap of Philadelphia, assignee of J. W. Perit and Joseph Cabox, formerly partners trading under the firm of Perit & Cabox, for detention and injury to the brig <i>Elizabeth Ann</i> of Philadelphia, the sum of three thousand nine hundred and fifty dollars and fifty cents .....	3, 950. 50
"To Joseph A. Clay of Philadelphia, administrator of C. G. Swett, for articles stolen and detention of the brig <i>Elizabeth Ann</i> of Philadelphia, the sum of four thousand four hundred and thirty-five dollars and fifty-six cents .....	4, 435. 56
"To Eliza Paul of Philadelphia, administratrix of Masklin Clark, for detention of the brig <i>Thetis</i> , the sum of seven thousand one hundred and eighty-one dollars and eighty-seven cents .....	7, 181. 87
"To Thomas C. Amory and Benjamin Humphreys of Boston, executors of John S. Ellery, to and for the use of the estate of the said Ellery, and in trust for the estate of Phillip Mercier, or his legal representatives, for any interest he had in the brig <i>Macedonian</i> of Boston and certain disbursements, for the confiscation of the brig, the sum of thirty-two thousand one hundred and ninety-three dollars and sixty-three cents .....	32, 193. 63

"To Thomas C. Amory and Benjamin Humphreys of Boston, administrators of John S. Ellery, Henry Farnam of Boston, administrator of Eliphalet Smith, and Thomas H. Perkins of Boston, for confiscation of the cargo of the brig *Macedonian* of Boston, the sum of fifty-nine thousand and ninety-three dollars and eighty-seven cents ..... \$59, 093. 87

Aggregate amount allowed ..... 421, 432. 41

"The aggregate allowed being greater than the whole amount of the indemnity provided for in the Convention, the several awards are made the basis in each case of the rateable proportion to which the claimants are entitled by the provisions of the Act of the 8th August 1846, in respect to all the sums which have been received or may hereafter be received by the United States from the Republic of Peru, under the stipulations of the Convention aforesaid, first deducting from the whole amount received the sum of three thousand dollars, agreeably to the directions of the fourth section of the Act aforesaid.

"By the fifth section of said Act payments to each claimant are made subject to a further deduction for any sum that may be due to the United States from the person in whose favor the award is made.

"NATHAN CLIFFORD,  
"Attorney-General.

"Attest:

JOHN T. REID, *Clerk.*

"Claims rejected.

"Samuel F. Tracy of New York, assignee of Henry D. Tracy, special claim for damages resulting to mercantile establishment and credit from an illegal arrest and expenses incurred in defense of person and property. Amount claimed, including interest ..... \$64, 737. 75

"Rejected for the reason that no part of the claim is embraced within the terms of the Convention.

Isabella Cole and Charles F. Mayer of Baltimore, executors of William Cole, for the seizure and detention of the schooner *Rampart* and for damages done to her and for various articles plundered from the ship and cargo. Amount claimed. .... 8, 008. 00

"Rejected for the reason that no such claim was included in Mr. Larned's list presented to the Government of Peru, and that no part of it is therefore embraced within the terms of the Convention, and for the further reason that the evidence in the case shows that the injuries complained of were committed by the Spanish authorities.

"Charles Thomson Jones of Philadelphia, assignee of Oliver Brooks, compensation for loss of primage and for sundry expenses and detentions during the seizure of the brig *Elizabeth Ann*. Amount claimed with interest. .... 2, 320. 00

"Rejected for the reason that no part of the claim is embraced within the terms of the convention.

"William A. Folger of New York; claim for articles of clothing, etc., robbed from him on board the *Eliza Barker*. Amount claimed ..... 356. 70

"Rejected for the reason first assigned in the case of Isabella Cole and Charles F. Mayer.

"James Reeves of New York, same claim as that of Folger. Amount claimed. .... 254. 50

"Rejected for the reason first assigned in the case of Isabella Cole and Charles F. Mayer.

"Frederick Cartwright of New York, same claim as that of Folger. Amount claimed ..... 159. 90

"Rejected for the reason first assigned in the case of Isabella Cole and Charles F. Mayer.

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"Emmeline B. Riddle, widow of Charles B. Riddle, in behalf of herself and children; same claim as that of Folger for articles of clothing robbed from her husband. Amount claimed.....

\$257. 40

"Rejected for the reason first assigned in the case of Isabella Cole and Charles F. Mayer.

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"\$76,094. 25

"NATHAN CLIFFORD,

"Attorney-General.

"Attest:

"JOHN T. REID, Clerk."



## CHAPTER I.

### THE BRAZILIAN INDEMNITY: CONVENTION OF JANUARY 24, 1849.

**Terms of the Convention.** By a convention concluded at Rio de Janeiro, January 27, 1849, by David Tod, envoy extraordinary and minister plenipotentiary of the United States near the court of Brazil, and the Viscount of Olinda, then Brazilian secretary of state for foreign affairs, a settlement was effected of the long-pending claims of citizens of the United States against the Government of Brazil, by the latter government agreeing "to place at the disposition of the President of the United States the amount of 530,000 milreis, current money of Brazil, as a reasonable and equitable sum," to comprehend "the whole of the reclamations" collectively, without reference to the merits of any particular case. This sum it was left to the United States to distribute among the claimants; and in order that this might be done properly, it was provided that any documents which threw light on the claims should be delivered by the imperial government to that of the United States.

It was stipulated that the indemnity should bear interest at the rate of 6 per cent from July 1, 1849, till it was paid.

**Legislation.** Mr. Tod recommended that the tribunal to distribute the indemnity should sit at Rio de Janeiro, and in this recommendation some of the claimants concurred.<sup>1</sup> An act was, however, approved March 29, 1850,<sup>2</sup> by which provision was made for the appointment of a commissioner to sit in Washington, and of a clerk to assist him. The commissioner was allowed \$3,000 a year, and the clerk \$2,000; and the commissioner was required to complete his labors within a year from the time of his first attendance in Washington.

**Organization of the Commission.** July 1, 1850, Mr. John M. Clayton, Secretary of State, transmitted to Mr. George P. Fisher, of Delaware, a commission from the President, appointing him, by and with the advice and consent of the Senate, as commissioner under the convention and the act of Congress; and on the same day Mr. Clayton transmitted a similar commission to Mr. Philip N. Searle, of New York, as clerk. Mr. Searle was afterward succeeded as clerk by Mr. Charles Howard Edwards.

Mr. Fisher entered upon the discharge of his duties as commissioner on July 1, 1850. He adopted rules for the government of procedure, and issued a notice of his appointment through the public press.

<sup>1</sup> Mr. Tod to Mr. Clayton, August 23, 1849, H. Ex. Doc. 19, 31 Cong. 1 sess.

<sup>2</sup> 9 Stats. at L. 422.

July 6, 1850, Mr. Clayton transmitted to the clerk of the commission all the papers then in the Department of State relating to the claims that were to be adjusted.

On August 19, 1850, Mr. Webster, as Secretary of State, informed the commissioner that Mr. Ford, the diplomatic representative of the United States at Rio de Janeiro, had been instructed to apply to the minister for foreign affairs of Brazil for papers in the possession of that government. Various documents from Brazil were received in February 1851.

By an act of March 3, 1851, the act of March 29, 1850, was continued in force for a year from March 1, 1851.<sup>1</sup> This extension, however, proved to be insufficient for the purposes of the commission, owing to circumstances which were stated in a letter to Mr. Webster of February 2, 1852, which was as follows:

"OFFICE OF THE COMMISSIONER TO  
"ADJUST CLAIMS AGAINST BRAZIL,  
"Washington, 2 February 1852.

"HON. DANIEL WEBSTER,  
"Secretary of State.

"SIR: The near approach of the day to which this commission is limited by act of Congress, and the slow progress which has been made in the business for which it was established, admonish me of the propriety of placing before you a summary of its proceedings; to which I have the honor respectfully to solicit your attention.

"On the 1st day of July 1850 I entered upon the discharge of my duties; since which time only twenty-one cases of claims have been presented for my examination and decision.

"Six of these have been ruled out upon the ground that they had never been presented to the imperial government prior to the negotiation of the convention between the United States and the Emperor of Brazil of the 27th of January 1849, and were therefore not such claims as were included in it. The aggregate amount of these six claims is about two hundred and eighty thousand dollars.

"In five other cases I have awarded in favor of the claimants. The aggregate amount of these awards is about seven thousand dollars.

"One of the claims has been decided adversely to the claimant, upon the ground that there was no evidence whatever to support it. The amount claimed in this case was about twenty-five thousand dollars.

"It will be seen therefore that there still remain nine cases in which the memorials of the claimants have been presented, but which have not yet been decided owing to the difficulties the claimants have met with in obtaining testimony.

"I have from time to time, by letter, reminded the claimants and their attorneys that the term of this commission is limited to the 1st day of March next, with the view that they might exercise all diligence in presenting the evidence in support of their claims; and I must do them the justice to say that in my opinion there are but few instances in which due diligence has not been used.

"There is every probability that the nine cases last above mentioned may be adjudicated by the 1st day of March next. If each of these shall be decided favorably to the claimant, the aggregate amount of the awards would, according to the best estimate I can form, range from one hundred and seventy-five thousand to two hundred thousand dollars.

"In addition to the above there are still nineteen cases which have been presented by the Government of the United States to the imperial government of Brazil for indemnity, and which are therefore comprehended under the convention of 1849; but which have not as yet been presented to me for adjustment. This number includes several of the largest and most complicated claims.

<sup>1</sup>9 Stats. at L. 606.

"I have been informed by the claimants in some of these cases that they have met with much difficulty in procuring from Brazil the documents and papers which are necessary to enable them not only to establish, but even to present their claims in proper form.

"You will recollect that, as long ago as the month of August 1850, instructions were given to our minister at Rio de Janeiro to call upon the department of state for foreign affairs of the imperial government for a compliance with the third article of the treaty, by which it was stipulated that the imperial government should deliver to that of the United States 'the respective documents which throw light upon' the claims comprehended in that convention.

"In pursuance of these instructions that demand was made by our minister at Rio de Janeiro, but the result was the production of a mere handful of papers which related only to a few of the claims, and which were in most cases of comparatively little value.

"I have been informed by the attorneys in several cases that they have many months ago, under the auspices of the State Department, put forth fresh efforts to procure from Brazil evidence relating to their respective cases. Of the result of these renewed applications I am not apprised, but from the fact that these efforts have first to be directed to Rio de Janeiro and thence to the different provinces of a large empire embracing a sea coast of nearly three thousand miles, and sometimes to the interior of these provinces where the facilities of travel and communication are limited in the extreme, it is believed there is but little probability that any evidence from that empire will reach here in time to be of service to the claimants in presenting their cases to this commission, should it be closed upon the day to which it is limited. Indeed were all the cases now fully presented with ample proof to sustain each claim, I do not see how it could be possible for me to give them that proper examination which justice and equity would demand within the short space of four weeks.

"You will bear in mind that many of these claims have been subjects of correspondence between the Department of State and the United States legation at Rio de Janeiro, and of discussion between that legation and the department of state for foreign affairs of the imperial government of Brazil for many years past. Several of them are coeval with the imperial government, whilst others date even beyond the separation of Brazil from the mother country.

"As might naturally have been expected, many of the original claimants have been long since dead. Some of the claims arise out of the seizure and detention of vessels which were the property of several joint owners, of whom some have died, some have failed in business, turning their interests over to assignees, and others are scattered over different parts of the country from Maine to California. All these circumstances have conspired to delay even the inception of proceedings, in cases where such circumstances have occurred.

"The sum paid by the Government of Brazil to that of the United States as indemnity under the convention of 1849 was five hundred and thirty contos of reis, which with interest and exchange realized about three hundred thousand dollars of our currency.<sup>1</sup> If from this sum be deducted the estimated aggregate of awards already made and which may be made before the 1st day of March next, there will then remain in the Treasury of the United States, of the indemnity paid, from one hundred and thirty thousand to one hundred and fifty thousand dollars, or nearly one moiety of the fund. Should the commission then be closed with this state of things existing, I need not hint at the seemingly awkward position our government would occupy towards that of Brazil, having distributed but little more than one-half of the sum demanded and received of her as indemnity for wrongs and injuries committed upon our citizens.

"It is manifest that these citizens will have to sustain loss against which they could not provide, owing to the circumstances which have

<sup>1</sup>The precise sum realized proved to be \$322,535.98. (Mr. Corwin, Sec. of the Treasury, to Mr. Fisher, February 26, 1852, MSS. Dept. of State.)

transpired within the long period of time during which negotiations have been pending, while the Government of Brazil will at the same time have apparent cause to complain of injustice suffered at our hands; and so long as that cause shall continue to exist, that government cannot fail to regard every claim hereafter to be made upon it by the Government of the United States with that prejudice which the mention of past injustice must certainly engender.

"With these remarks I have respectfully to request that you will call the attention of the President to this subject, in order that he may consider upon the propriety of placing it before Congress.

"I have the honor to be, Sir, your obedient servant,

"GEO. P. FISHER."

This letter was duly communicated by the President to Congress,<sup>1</sup> and an act was passed and approved extending the act of March 29, 1850, for a period of four months from and after March 1, 1852.<sup>2</sup> The time for filing memorials was extended to January 1, 1852.

The character of the claims before the commission is disclosed in the following letter:

"OFFICE OF THE COMMISSIONER TO  
"ADJUST CLAIMS AGAINST BRAZIL,  
"Washington, 10th January 1851.

"Hon. WALTER UNDERHILL,  
"House of Representatives.

"SIR: Your letter addressed to the Hon. Daniel Webster, Secretary of State, with its enclosures, propounding 'questions respecting the nature and extent of the claims allowed to the citizens of the United States in the recent treaty' between this government and the Emperor of Brazil, was yesterday referred to me by the Department of State for an answer.

"In reply to the questions asked I have the honor to communicate the following information:

"There are several classes of claims of American citizens which have from time to time been presented with demands for satisfaction by the Government of the United States to that of Brazil, thro' our legation at Rio de Janeiro. The first, is that class known as the prize claims, which originated upwards of 20 years ago during the war between Brazil and Buenos Ayres by reason of captures made by the imperial blockading squadron of American vessels for alleged attempts to enter the ports of Buenos Ayres in violation of the law of blockade.

"Second. Claims for damages resulting from the seizure and detention of vessels at various ports in Brazil on the alleged ground that said vessels bore the American flag unlawfully, or that they were destined to places in the various provinces from which communication at the time was cut off by an imperial order.

"Third. Claims for interest accruing after the acknowledgment of the demand for the principal.

"Fourth. Claims for the restitution of anchorage duties, duties on importation paid twice, port charges, fines, and for provincial duties and taxes.

"Fifth. Claims arising out of contracts of individuals with the imperial government.

"Sixth. For damages occasioned by imprisonment, confiscation of property, and other wrongs to individuals.

"Seventh. For expenses incurred in consequence of unlawful acts of the imperial government.

"Every claim of each of these classes was warmly resisted by the imperial government, and in the first article of the convention of the 27th January 1849, herewith transmitted, it is expressly stated that the Gov-

<sup>1</sup> Message of February 16, 1852, H. Ex. Doc. 75, 32 Cong. 1 sess.

<sup>2</sup> Act of February 27, 1852, 10 Stats. at L. 146.



ernment of Brazil entertained a belief of their injustice; and it was therefore agreed that the whole of the claims presented up to the date of the convention should be settled by an act—the payment to the Government of the United States of 530,000 milreis, and that the imperial government should be exonerated from all responsibility springing out of said claims, it being left to the United States to distribute said sum among the claimants according to the merits of their respective claims.

"To convey a proper understanding of the merits of each claim would require a statement in manuscript of at least 300 pages.

"Such a document I have now in my possession, and it will afford me much pleasure to submit it to you for your perusal, whenever you may find it convenient to honor me with a call either at this office, corner of 13th and I streets, or at my residence in 9th street above F street, after office hours.

"With perfect respect, I am, Sir, your obedient servant,

"GEORGE P. FISHER."

In several cases the grounds on which the awards were based were stated in letters of the commissioner to some of the interested parties. One of these cases was that of the schooner *John S. Bryan*, which was seized in the province of Para in June 1836. On October 15, 1842, commissioners were appointed by the government of Brazil and the United States legation at Rio de Janeiro, respectively, to determine the amount of loss and damage suffered by the schooner in consequence of her seizure and detention. June 12, 1843, the commissioners awarded the sum of 26 contos of reis, to be paid by the imperial government as "indemnification in full of the value of the schooner *John S. Bryan*, her cargo, freight, wages, expenses ordinary and extraordinary, exchanges, interest, etc." The payment of this sum was withheld till May 20, 1846, a period of two years eleven months and eight days, when it was paid to the minister of the United States at Rio de Janeiro without interest from the day of liquidation. The claim in the present case was for interest, and for the expenses incurred in the prosecution of the original claim. On the facts thus presented, Mr. Fisher made the following decision:<sup>1</sup>

"I have awarded to the claimant T. Perkins Pingree, out of the sum paid by the Imperial Government of Brazil to the Government of the United States, under the stipulations of the convention of the 27th day of January 1849, the principal sum of two thousand four hundred and forty-four dollars and ninety-one cents, it being the amount which had accrued as interest on the original award of twenty-six contos of reis from the day of liquidation till the day of payment; and the further sum of eight hundred and forty-seven dollars and sixteen cents as interest upon the aforesaid sum of two thousand four hundred and forty-four dollars and ninety-one cents (which last sum was due and should have been paid on the 20th day of May 1846) from said 20th of May 1846 until the 1st day of March next (1852), the day on which this commission will expire; making in the whole, the sum of three thousand two hundred and ninety-two dollars and seven cents.

"The principle on which this sum is awarded is one which has long been settled and which the Brazilian Government, in this case at least, has not attempted to deny. Indeed, the officer to whom the claims of American citizens were referred by the minister of foreign affairs of Brazil for examination, shortly previous to the negotiation of the Convention of 1849, in speaking of the claim of Mr. Pingree, says that it, being a claim for 'interest on principal, appears to have grounds in equity.'

<sup>1</sup> Mr. Fisher to Mr. Matteson, August 7, 1851. MSS. Dept. of State.

"With regard however to that part of the claim which is made for and on account of expenses incurred by the claimant in the prosecution of his original claim, I cannot make any allowance, as it would be establishing a principle which, if once generally admitted, would prove as dangerous as it is new."

In the case of the brig *Aspasia*, of Baltimore, William Case of the "*Aspasia*." Massicott, owner and master, it appeared that during the year 1830 the brig sailed from Baltimore for Cadiz, in Spain, with the proper and necessary documents for that port, a free port at which there was no consular representative of Brazil. On touching at Cadiz, Massicott found the state of the market unfavorable, and he then sailed for Rio de Janeiro, with a certificate from the health officer and harbor master at Cadiz in due form. It appeared that he arrived at Rio de Janeiro about the last of September or the 1st of October 1830; that he was permitted to land his cargo, according to the usual custom in that port, but that on applying for permission to reload his vessel with the produce of the country such permission was refused for thirty-one days, during which time he was detained and prevented from receiving the value of his discharged cargo in the produce of the country; that after the lapse of this period the imperial government conceded that he had a right to take in a return cargo of the produce of the country, but denied him compensation for his detention. On these facts the commission held:

"The detention and the final concession of the right to take a return cargo are admitted by the Brazilian authorities, but they refused demurrage on the ground that the 'thirty-one days were wasted in this controversy,' though it is added that 'the right was conceded to the vessel to take in cargo.' It cannot with any shadow of reason be alleged that the mere detention of thirty-one days was necessary to perfect the captain's right to take in cargo; indeed this is not pretended by the imperial government. It is therefore clear that if he had the right to take in cargo after the expiration of that time, he had the right on his first applying for the permission; and the detention was no act of his but that of the imperial government, for which it is accountable. It is also shown by the correspondence between the United States legation at Rio de Janeiro and the minister of foreign affairs that the claim was duly presented prior to the negotiation of the convention of 1849 and formed a part of the basis of that convention."<sup>1</sup>

In the case of the schooner *Hope*, the statement of Case of the Schooner "Hope." facts made by the commissioner was as follows:<sup>2</sup>

"The memorial sets forth as follows, Viz: That in the month of August A. D. 1837, the said Samuel B. Harper shipped on board the said schooner *Hope*, of which he was then the sole owner, and of which Joseph C. Moore was master, at the port of Alexandria, an assorted cargo of merchandise, all the absolute property of him the said Samuel B. Harper, destined for Maranhã in Brazil and a market. That on the 10th day of that month the master of said schooner declared before the vice-consul of Brazil for the port of Alexandria to the truth of two duplicate manifests of said cargo valued at ten thousand seven hundred and twenty dollars and two cents. That on the day following the said master in compliance with the laws of the United States made oath to the truth of said manifests before the collector of customs for said port of Alexandria and cleared said schooner thence for Maranhã and a market. That on the 12th day of the same month he the said master sailed for the said port of Maranhã where he arrived on the 27th day of September following. That on arriving at Maranhã a fine was imposed upon and the payment thereof enforced

<sup>1</sup> Mr. Fisher to Mr. T. Collins Lee, January 28, 1852, MSS. Dept. of State.

<sup>2</sup> Mr. Fisher to Mr. Snethen, June 16, 1851, MSS. Dept. of State.

against the said schooner, because he the said master (as he the said master was informed by the Brazilian authorities) had not brought with him from the Brazilian vice-consul for Alexandria a sealed-up copy of the manifest of cargo addressed to the collector of customs at Maranham. That having applied to the collector of said port of Maranham for a remission of the fine upon the ground that he was ignorant at the time he sailed from Alexandria of the existence of any law or regulation of the empire of Brazil requiring a sealed-up copy of the manifest of cargo addressed as aforesaid the said application was refused, and that thereupon the consignees of said vessel and cargo having procured from the Brazilian authorities at said port of Maranham one of the said duplicate manifests forwarded the same to the said vice-consul of Brazil with information of the imposition and payment of said fine, and that the said vice-consul on the 19th day of July 1838 did certify under seal of his said consulate to the identity of said duplicate, and that he the said vice-consul had not on the 10th day of August aforesaid received from the Government of Brazil or from any of its officers any instructions whatever requiring him to seal up one of the duplicate manifests of cargoes of vessels destined to ports of Brazil and send the same by said vessels to the collector of the port for which said vessels were destined, and that in all respects he the said vice-consul had complied with such instructions as up to that time he had received from the government whose agent he was. That upon the receipt of the aforementioned certificate the consul of the United States for the port of Maranham, who was also one of the consignees of said vessel and cargo, submitted the same with an application to the proper officer of Brazil, praying for a restitution of said fine. That said application was rejected upon the ground that it was not made within the time limited by the imperial regulations. That after this refusal, but before the negotiation of the convention aforesaid, a claim for the restitution of said fine was presented not only to the Minister of the United States at Rio de Janeiro, but also to the Secretary of State of the United States at Washington, in order that the same might be demanded of the Brazilian Government. That neither the said Samuel B. Harper nor his representatives nor any other person for him or them nor the memorialist nor any person for him has ever received any sum of money or other equivalent or indemnification for the whole or any part of said reclamation."

On these facts the commissioner, after a somewhat extended discussion, held:

"Under the circumstances of the case I consider the imposition of the fine upon the schooner *Hope* to have been neither more nor less than the arbitrary exaction of a penalty from an innocent party by the imperial government for its own fault in failing to furnish its commercial agent in Alexandria with information of the commercial regulations under which that fine was imposed. And the refusal of the application to refund the fine upon the presentation of the certificate of the Brazilian vice-consul of the innocence of the party from whom it was exacted, because the lapse of a few months from the imposition of the fine, was as ungenerous as the original exaction was unjust."

The commissioner therefore awarded the claimant the sum of \$606.06, with interest at 6 per cent from September 29, 1837, to February 29, 1852.

In the case of the brig *Toucan* a claim was made for the alleged unlawful detention by the imperial authorities of the brig and her cargo at San Joze do Norte from February 13, 1836, to March 2 following, a period of seventeen days. It was alleged that the *Toucan* sailed from Boston on October 17, 1835, with a valuable cargo, for St. Catherines, Brazil, and a market; that she arrived in the course of her voyage at San Joze, where she discharged a part of her cargo, retaining the rest, valued at \$28,000, on board; that she

was ready to leave San Joze on February 13, 1836, when the master attempted to clear for Porto Alegre, Brazil; that he was refused a clearance for that port, and was prevented from going thither by the Brazilian authorities, on the ground that the port was in the possession of insurgents, and that he was not permitted to sail to Porto Alegre till March 2, 1836. On these facts the commissioner said:¹

"The question arises whether under the seventh article of the treaty between the United States and the Emperor of Brazil concluded at Rio de Janeiro on the 12th December 1828 and which was in full force and virtue when the facts are alleged to have occurred, the imperial government is liable to the claimants for damages and losses occasioned by reason of the brig and cargo remaining at San Joze do Norte.

"The seventh article of said treaty is in the following words, viz: 'The citizens and subjects of neither of the contracting parties shall be liable to any embargo, nor be detained with their vessels, cargoes or merchandise or effects, for any military expedition, nor for any public or private purpose whatever, without allowing to those interested a sufficient indemnification.'

"An embargo is a proclamation or order of state usually issued in time of war or threatened hostilities prohibiting the departure of ships or goods from some or all the ports of such state until further order.' In this case the *Toucan* was not subjected to any embargo, nor was this vessel or her cargo detained for any military expedition or for any public or private purpose whatever, save the private purpose of the master who for seventeen days insisted on carrying out his cherished object of going up to Porto Alegre, until he at length obtained permission to clear for that port.

"For it is nowhere alleged in the memorial or in either of the protests of the master that the *Toucan* and her cargo were not at any time during said seventeen days free to go from San Joze do Norte to any port in Brazil except Porto Alegre, or to any port in any other country.

"The preventing of the *Toucan* and other vessels by the Brazilian authorities from going up to an interior port which had been closed on account of a civil insurrection existing there at the time, was but the exercise of a right incident to a sovereign state; and amounting to no embargo upon that ship or other vessels in San Joze; nor to a detention of her or them so long as they were free to go elsewhere than to said port of Alegre.

"With this view of the law touching the said claim for detention at San Joze, I should be compelled to rule out that part of the claim, however clearly the fact of the prevention of the brig from clearing for Porto Alegre by the Brazilian authorities might be established by the evidence."

There was a second claim in the memorial for the alleged detention by the Brazilian authorities of the *Toucan* and her cargo at Porto Alegre from the 5th April to the 5th September 1836. In regard to this claim the commissioner said:

"This claim I divide into two branches.

"1st. That for the detention at Porto Alegre from the 5th April to the 15th of June 1836, at which last date that port was repossessed by the imperial forces; and the 2nd, that for the detention which is alleged to have continued from the 15th of June till the 5th of September. I make this division because, although it is nowhere alleged in the memorial that Porto Alegre was at this time retaken by the imperial powers, yet such is the well-authenticated historical fact.

"Let us suppose, then, as in reference to the claim first set forth in the memorial, that all the material allegations contained in the memorial from the sailing of the brig from Boston till permission was granted to the master on the 2nd of March to clear her from San Joze to Porto Alegre; and further let it be granted for the sake of the argument that it is proved as laid in the memorial that the *Toucan* sailed for said Port of Alegre on the

¹ Mr. Fisher to the Hon. H. Hamlin, May 22, 1851, MSS. Dept. of State.

4th of March 1836, and arrived there on the 15th of that month; and that in consequence of the communication between that port and the rest of the province being entirely cut off by order of the imperial authorities, the brig was detained there during the period alleged in the memorial, viz: from the 5th day of April till the 5th day of September. Then, if the Brazilian Government had the right, which I am satisfied it clearly possessed, to close the port of Alegre to navigation so long as it should remain in possession of the insurgents, the question is presented whether, after having availed himself of the permission granted, by special favor and not as of right, to go up to Porto Alegre, the master of the *Toucan* can hold that government liable to heavy damages for the refusal to grant him the additional special favor of again temporarily opening the uncommunicated port in order to allow him to return thence, so long as that port continued to be held by the rebel forces. In my opinion no such liability ever existed; for the permission to go up to Porto Alegre did not carry with it the liberty to return thence so long as the rebels retained possession of it. On the contrary, in availing himself of the privilege, yielded after much solicitation, to go to Porto Alegre, he assumed the responsibility for the consequences which followed, and voluntarily took upon himself to abide the chances of a speedy restoration of order there or of a second suspension in his favor of the decree by which that port was known to him to be closed.

"For these reasons I shall also be compelled to decide against that portion of the second claim contained in the memorial which is based upon the detention of the brig and cargo in Porto Alegre from the 5th of April till the 15th of June.

"But as the imperial decree of the 3rd of March 1836, ratifying the provisional order of the president of the province of Rio Grande, closed the port of Alegre only until order should be restored there, and as it is fair to presume that order was restored there on the 15th day of June, the day on which the imperial forces regained possession of said port, the Brazilian Government is in my opinion liable for all the losses and damages which the *Toucan* and her cargo sustained during the detention which occurred subsequent to that time, provided no offense against the laws of the empire was committed by the master of said brig to justify said detention. So far as I am at present advised the Government of Brazil in its correspondence with that of the United States in relation to this case has never alleged that any such offence was committed."

An award was made accordingly.

The master and crew of the American whale ship *Tarquini*, at great personal risk, as well as at the risk of losing their ship, saved a transport belonging to John

VI. King of Portugal, Brazil, and the Algarves, then having his court at Rio de Janeiro, and succeeded in bringing the transport into the harbor of Santos, in Brazil. In consideration of this service, by which the *Tarquini* lost the chances of a whaling voyage, the King issued an order for the completion of her cargo of oil from the royal magazines at Rio de Janeiro—under all the circumstances a fair compensation for the service rendered. The order thus issued was, however, evaded by the officers of the Crown, who put on board only 229 barrels of oil, while her capacity was upward of 1,300 barrels. The ship waited at Rio for ten months, in the hope that the order of the King would be executed, but it was not done. She then returned with what she had on board, including the oil obtained at Rio, to Nantucket, her home port. On these facts the commissioner said: <sup>1</sup>

<sup>1</sup> Mr. Fisher to the Hon. H. Hamlin, February 26, 1852, MSS. Dept. of State.

"The citizenship of the captain and owners of the *Tarquin* is proved by the best evidence of which the nature of the case will admit. The citizenship of the persons composing the crew it was not necessary to have established, because they are not and never were claimants against the Government of Brazil; their claim was and is against the part owners of the *Tarquin*, the share of each individual of the crew of a whaler being in 'the nature of wages unliquidated at the time, but capable of being reduced to a certainty upon a conversion of the oil into money;' in other words, had the *Tarquin* pursued her voyage regularly, and returned into Nantucket, with a full cargo of oil, each individual of her crew would have been entitled to receive wages to the extent of his proportion in the produce of the voyage. Their remedy would have been assumpsit against the owners had the latter refused to comply with their engagements; but the owners had the right to claim the whole amount of oil necessary to complete the cargo against the Brazilian Government, whether the crew of the *Tarquin* were Americans or not.

"The award and distribution of it are based upon these principles.

"The material facts alleged in the memorial as the basis of the claim preferred being fully established, it becomes necessary to enquire whether the present Government of Brazil is liable to the claimants, or whether her separation from Portugal has released her from that liability in whole or in part.

"It is true that until the Portuguese monarch was driven by the convulsions which shook the continent of Europe in the beginning of the present century to transfer his court from Lisbon to Rio de Janeiro in 1808, Brazil had been but a mere colony of Portugal; but from the date of the establishment of that court at Rio de Janeiro, Brazil may be said to have begun to emerge from her state of colonial vassalage and to have risen gradually to dignity and preeminence, until on the 17th day of December 1815 she was finally elevated by the Prince Regent to become a Kingdom, and was immediately united with Portugal and the Algarves under the style and title of the United Kingdom of Portugal, Brazil and the Algarves. This event is commemorated by Mr. Sumter, the United States minister then residing at Rio de Janeiro, in a despatch addressed to the Department of State, bearing date of the 29th December 1815, in the following language: 'Under the cover marked A you will find a Law which was published at this Court on the 17th inst., which was the Queen's Birthday, erecting Brazil into a Kingdom, uniting it, together with the Kingdoms of Portugal and the Algarves, in one political body, and assuming for the Prince a title analogous to this change and union.' In the paper referred to it is decreed as follows: "That from and after the publication of the present law the State of Brazil shall be raised to the dignity, preeminence, title, and denomination of the Kingdom of Brazil; second, that my Kingdoms of Portugal, Algarves and Brazil shall henceforth be one single Kingdom under the title of the United Kingdom of Portugal, Brazil and the Algarves.' Thus it was that the sovereignty of Brazil was formally declared by the Prince Regent himself, whilst that sovereignty had been before recognized by the Treaty of Vienna, and Brazil became one of the coordinate States of the United Kingdom of Portugal, Brazil and the Algarves, each of which coordinate States was invested with the right of self-government, Brazil having its own legislative assembly, and being actually the residence of the head of the United Kingdom and of his Court. Such was the status of Brazil when the claim in question originated, to wit, in the summer of 1816. The vessel engaged in the service of Brazil, and the troops on board that vessel were at the time from the Prince Regent, made in accordance with his promise to Capt. Bunker to fill up the complement of his cargo of oil in satisfaction of the claim of salvage, was issued in Rio de Janeiro and was to have been executed there by taking so much oil from the royal magazines in that city; so that the service rendered by the *Tarquin* was rendered to Brazil alone, and that service was very properly ordered by the Prince Regent to be requited at the expense of Brazil alone. No contribution whatever was to have been made by Portugal. The question then presents itself whether on the separation of the two countries which subsequently took place this

claim, still remaining unliquidated, became extinguished altogether by that separation, or was transferred in whole or in part to Portugal from Brazil, whose royal magazine was to have furnished the oil decreed to be delivered to Capt. Bunker, and which (that oil never having been so delivered) was the gainer by so much oil or its equivalent (all public property upon the separation remaining in Portugal or Brazil just as that separation happened to find it), or whether Brazil alone should be held to the entire liability of the claim.

"This claim was in the nature of a public debt, founded upon the King's decree, and by the rule of international law public debts are not extinguished upon the division of a state into distinct states, whether that division be by war or mutual consent; but they must be discharged either jointly or severally according to the principles of justice and equity. And as to Brazil accrued the entire benefit of the service rendered by the *Tarquin*, as in her royal magazines there remained for her benefit the oil with which that service should have been requitted and paid, in obedience to the order of the King, so also, upon every ground of equity and right, should the entire responsibility for this claim have passed to her upon her separation from Portugal."

On the grounds above stated the commissioner awarded to the claimants a sum representing (1) the value of the oil which it would have required to complete the cargo of the ship; (2) an indemnity for the ship's detention from September 24, 1816, the date of the order of the Prince Regent for the completion of the cargo, till February 20, 1817, when the United States minister at Rio de Janeiro informed the master that he had better abandon all hopes of having the order fulfilled, and leave Rio de Janeiro; and (3) interest at 6 per cent per annum on both the foregoing allowances from June 6, 1817, when the ship arrived at Nantucket, to the close of the commission.

The value of the oil for which the award was made was estimated according to the value at Nantucket of the oil which the *Tarquin* brought thither on her arrival.

On the last day of the commission, the commissioner  
**Summary of Awards.** and secretary certified a full record of the awards, which had been entered at large in a book kept for that purpose.<sup>1</sup> Of these awards the following summary is presented:

No. 1. Case of the bark *Sarah and Esther*, of Boston. Claimant, Daniel T. Willetts. Memorial filed October 13, 1850; amount claimed, \$17,732.30. Claim disallowed on the ground that it had not been presented by the United States to Brazil prior to January 27, 1849, the date of the conclusion of the convention.

No. 2. Case of Hayes, Engerer & Co. Claimant, Patrick Barry Hayes, in his own behalf, and as attorney in fact for John Bowen, being the sole surviving partners of the house of Hayes, Engerer & Co. Memorial filed December 11, 1850; amount claimed, Rs. 86,329,732, and \$160,000. Disallowed on the same grounds as No. 1.

No. 3. Case of the brig *Toucan*, of Boston. Claimants, Nathaniel Hamlin and Parker H. Pierce. Memorial filed December 20, 1850; amount claimed, \$24,220.5'. The sum of \$19,453.83 was found to be justly due; and on the basis of this sum an award was made in favor of the claimants, as the ratable proportion to which they were entitled out of the whole fund (\$322,535.98), for \$15,008.19.

<sup>1</sup>MSS. Dept. of State.

No. 4. Case of the sloop *Morning Star*, of Philadelphia. Claimants, Humphrey Hughes and Martha McQuin, administratrix of James McQuin, deceased. Memorials filed February 10, 1851; amounts claimed, Humphrey Hughes, \$7,152; Martha McQuin, \$3,576. Disallowed on same ground as No. 1.

No. 5. Case of bark *Yeoman*. Claimant, Bradford Barnes, jr. Memorial filed January 7, 1851; amount claimed, \$31,397. Disallowed on same ground as No. 1.

No. 6. Case of schooner *Shilleleh*, of Baltimore. Claimant, Richard S. Stewart, executor of the will of George Law (the assignee of John Odom, original owner of the schooner), and administrator of Samuel Rose (original owner of the cargo), by James Birkhead, his attorney in fact. Memorial filed February 22, 1851; amount claimed, \$79,847.17. Claim found to be valid to the amount of \$74,302.69. An item for sundry commissions against the schooner was rejected because it was "composed of commissions for services in attending to the suit instituted by the owners of said schooner against the Brazilian Government not allowable in admiralty cases as part of the costs and of commissions on sales of cargo which never were made, the same having been seized by the Brazilian Government." An award was made, on account of Law's interest, for \$24,273.22, and on account of Rose's for \$33,050.03, subject, however, to the deduction which the Secretary of the Treasury might make under the sixth section of the act of March 27, 1850.

No. 7. Case of the ship *Shamrock*. Claimant, Marcia Kennedy, administratrix of John F. Kennedy. Memorial filed February 22, 1851; amount claimed, \$56,324.78. In a supplementary memorial an additional claim was made for \$20,973.96. Claim found to be valid to the amount of \$26,977.50; ratable proportion awarded, \$20,812.57, of which the sum of \$3,389.08 was set apart, by consent, for John Gardner.

No. 8. Case of schooner *John S. Bryan*, of Boston. Claimant, Thomas P. Pingree. Memorial filed March 1, 1851; amount claimed, \$11,270.25. Claim found to be valid to the amount of \$3,249.47; proportion awarded, \$2,506.90.

No. 9. Case of the ship *Shamrock*, of Beverly, Massachusetts. Claimant, William Burroughs. Memorial filed March 5, 1851; amount claimed, \$57,587.73½. Found to be valid to the amount of \$23,777.80; proportion awarded, \$18,344.12.

No. 10. Case of the brig *Sally Dana*, of Philadelphia. Claimants, John P. Bernadou and Sarah Ray. Memorial filed March 15, 1851; amount claimed, \$13,023.72. Claim disallowed on the ground (1) that the charter party, a breach of which on the part of the Brazilian authorities was alleged, was not shown to have been executed by those authorities, and (2) "that according to the principles of international law as uniformly acknowledged and acted upon by the Government of the United States it can not enforce or demand any claim arising out of a mere contract between one of its citizens and a foreign government."

No. 11. Case of the schooner *Hope*. Claimant, William W. Harper, administrator of Samuel B. Harper. Memorial filed May 5, 1851; amount claimed, \$2,292. Found to be valid to the amount of \$1,130.30; proportion awarded, \$872.08.



No. 12. Case of the *sumaca Felicidade*, of Buenos Ayres. Claimants, Putnam I. Farnham and Jed Frye, George D. Phippen, administrator of Peter E. Webster, and John Bertram, by Putnam I. Farnham, their attorney in fact. Memorial filed May 12, 1851; amount claimed, \$25,045.07. Found to be valid to the amount of \$18,453.90; proportion awarded, \$14,229.60.

No. 13. Case of the brig *Aspasia*, of Baltimore. Claimant, Catherine E. Massicott, executrix of William Massicott. Memorial filed May 20, 1851; amount claimed, \$1,030.49, with interest. Found to be valid to the amount of \$2,353.81; proportion awarded, \$1,810.65.

No. 14. Case of the ship *Tarquin*. Claimants, Alexander C. Mitchell and Richard Mitchell, partners; Eliza B. Coffin, administratrix of Jared Gardner; Sophia Barrett, administratrix of George Barrett; William B. Coffin and Reuben Swain, 2d, executors of John Swain; Nathaniel Barney, administrator of Valentine Swain; Deborah Brayton, administratrix of Robert Brayton; Tristram Starbuck, Benjamin F. Gardner, administrator of James Guin, and George M. Bunker, administrator of James Bunker, all represented by Alexander C. Mitchell, their attorney in fact. Memorial filed September 12, 1851; amount claimed, \$37,273.15, with interest. Found to be valid to the amount of \$69,869.14; proportion awarded, \$45,585.96. The award was itemized as follows: Alexander Mitchell and Richard Mitchell, \$8,837.02; George M. Bunker, \$5,203.79; Eliza B. Coffin, \$4,418.51; Sophia Barrett, \$4,418.51; William B. Coffin and Reuben Swain, 2d, \$4,418.51; Nathaniel Barney, \$4,418.51; Deborah Brayton, \$2,209.26; Tristram Starbuck, \$2,209.26; Benjamin F. Gardner, \$2,209.26; Barzillai Luce, \$1,925.09; Frederick Swain, \$1,418.50; Alexander Macy, \$1,122.97; William Hussey, \$1,122.97; James Swain, \$980.06; John Whitney, \$673.78; James Osband, \$634.15; David Young, \$634.15; John S. Coffin, \$634.15; William Steward, \$634.15; Lewis Dixon, \$634.15; George Butterfolk, \$598.92; John Luva, \$598.92; Thomas Wood, \$598.92; Robert Cathcart, \$598.92; Henry Dunsard, \$598.92; Thomas Russell, \$567.39; Charles Barnard, \$567.39; Peter Green, \$567.39; Reuben Bowers, \$449.19.

No. 15. Case of the ship *Canada*, of New York. Claimants, Richard I. Arnold, Edward A. Russell, Samuel Russell, Charles F. Tillinghast, executor of Radcliffe Hicks, and William R. Talbot. Memorial filed November 18, 1851; amount claimed, \$25,827.92. Found to be valid to the amount of \$1,559.78; proportion awarded, \$1,203.34.

No. 16. Case of Emanuel Gomez. Memorial filed November 22, 1851; amount claimed, \$336. Rejected on the ground that it was embraced in the claim of the brig *President Adams*, which was settled by Brazil prior to the convention of January 27, 1849.

No. 17. Case of Wright and Houghton. Claimants, John S. Wright and Mary H. Houghton, administratrix of Henry A. Houghton. Memorial filed December 1, 1851; amount claimed, \$14,678.27. Found to be valid; proportion awarded, \$11,208.30.

No. 18. Case of the bark *Navarre*, of Philadelphia. Claimant, James Devereux, by W. H. D. C. Wright, attorney in fact. Memorial filed December 1, 1851; amount claimed, Rs. 275 \$400. Found to be valid to the amount of \$196.99; proportion awarded, \$151.98.

No. 19. Case of the bark *Globe*, of Philadelphia. Claimant, John Devereux, by W. H. D. C. Wright, attorney in fact. Memorial filed December 1, 1851; amount claimed, Rs. 278 \$100. Found to be valid to the amount of \$199.22; proportion awarded, \$153.69.

No. 20. Case of the ship *Louisiana*, of New York. Claimants, Andrew Foster and George T. Foster, surviving partners of Andrew Foster & Sons, by W. H. D. C. Wright, attorney in fact. Memorial filed December 1, 1851; amount claimed, for a fine illegally exacted from the master of the ship, Rs. 400. Found to be valid to the amount of \$577.94; proportion awarded, \$445.87.

No. 21. Case of the ship *Florence*, of Boston. Claimant, Francis A. Gray, surviving partner of Francis A. and Samuel C. Gray, by W. H. D. C. Wright, attorney in fact. Memorial filed December 1, 1851; amount claimed, for fine illegally exacted, Rs. 1,393 \$000. Found to be valid to the amount of \$1,453.43; proportion awarded, \$1,121.29.

No. 22. Case of the bark *Mystic*, of New York. Claimant, Fortunato J. Figueira. Memorial filed January 29, 1852; amount claimed, \$31,401.50. Found to be valid to the amount of \$30,656.75; proportion awarded, \$23,651.04.

No. 23. Case of Isaac Austin Hayes. Claimant, Patrick Barry Hayes, administrator of Isaac Austin Hayes. Memorial filed February 4, 1852; amount claimed, \$90,000, and one-fifth of Rs. 62,739 \$703. Disallowed, "because the claim being one arising out of the alleged false imprisonment of the said Isaac Austin Hayes by the Brazilian authorities, all right to claim damages for said false imprisonment died with the person of said Hayes, according to the well-established maxim of law, '*Actio personalis moritur cum persona*.'" But subsequently, on reargument, the commissioner very properly abandoned this ground, made an allowance of \$1,000 in gross, and awarded the sum of \$771.48.

No. 24. Case of the brig *Brutus*, of New York. Claimant, Francis W. Dominick, by W. H. D. C. Wright, attorney in fact. Memorial filed February 17, 1852; another memorial filed March 1, 1852, by Henry Way, administrator of Dominick; amount claimed \$35,177. Found to be valid to the amount of \$38,655.83; proportion awarded, \$29,822.19.

No. 25. Case of Captain Wolfe. Claimant, William Wolfe, by W. H. D. C. Wright, attorney in fact. Memorial filed February 17, 1852; allowance made of \$2,150.27; proportion awarded, \$1,658.88.

No. 26. Case of the brig *Caspian*, of Boston. Claimants, John C. Zimmermann and Nalbro Frazier, composing the firm of Zimmermann, Frazier & Co., agents of the owners of the brig, by W. H. D. C. Wright, attorney in fact. Memorial filed February 17, 1851; allowance made of \$54,632.95. The proportional sums awarded were as follows: Nalbro Frazier, \$8,741.80; William Hammond, \$8,741.80; Wilhelmina de Valangin, administratrix of Albert P. de Valangin, \$4,370.90; Mary Lewis, administratrix of Stephen J. Lewis, \$11,551.94; James Ellison, executor of Joseph Baker, deceased, Henry F. Baker, and John W. Geyer, \$8,741.79.<sup>1</sup>

No. 27. Case of the brig *Sally Dana*, of Philadelphia. Claimant, Catherine Duval, executrix of James Duval. Memorial filed February 19, 1852; amount claimed, \$7,750. Rejected for reasons stated in No. 10.

No. 28. Case of Joseph Ray. Claimant, Margaret Ray, administratrix. Memorial filed February 27, 1852; amount claimed, Rs. 642,645 \$573. Rejected, because the evidence did not show that Joseph Ray had "suffered

<sup>1</sup> See Wright v. Ellison, 1 Wallace, 160.

by the act of the Government of Brazil any wrong or injury of which the Government of the United States could rightfully complain, or which could in any manner entitle the said Joseph Ray to indemnity from the Imperial Government of Brazil."

No. 29. Case of the brig *Argus*, of Boston. Claimants, William S. White, Henry H. Jones, Benjamin C. White, and James Smith. Memorial filed February 28, 1852; amount claimed, \$8,445.95. The claim was dismissed by the commissioner on the following grounds: "This claim is one which is alleged to have arisen under the 7th article of the 'Treaty or General Convention of Peace, Friendship, Commerce and Navigation between the United States of America, and His Majesty the Emperor of Brazil, concluded and signed at Rio de Janeiro, on the twelfth day of December 1828,' which article is in the following words, to wit, 'The citizens and subjects of neither of the contracting parties shall be liable to any embargo, nor be detained with their vessels, cargoes, or merchandise, or effects, for any military expedition, nor for any public or private purpose whatever, without allowing to those interested a sufficient indemnification.' In order to substantiate the claim it was necessary to have clearly shewn by the evidence that the said brig *Argus* was either subjected to an embargo at Rio Grande, or detained there for some military expedition, or for some public or private purpose; but it is not shewn by the evidence in the case that the said brig *Argus* was forcibly prevented from leaving Rio Grande to go to any other port or place in Brazil or elsewhere; except that she was not allowed to go to the port of Porto Alegre, which had fallen into the hands of a revolutionary party several months previous to the arrival of said brig *Argus* at Rio Grande, and between which place and Rio Grande all communication had been interdicted by an Imperial Decree, issued at least six weeks before said arrival. Upon a thorough examination of the evidence this case appears to be simply this: That the brig *Argus* arrived at Rio Grande at a time when all communication between that place and Porto Alegre was cut off by an Imperial Decree; that the Brazilian authorities at Rio Grande made no attempt whatever to prevent said brig from going to any other place than Porto Alegre; that the captain chose voluntarily to remain at Rio Grande because Porto Alegre was the place of his original destination. It is clear therefore that in this case there was neither an embargo nor detention, and that the Brazilian Government could not be held liable for the voluntary act of the master of the *Argus* in remaining at Rio Grande."

No. 30. Case of James Smith. Memorial filed February 28, 1852; amount claimed, \$11,500. Allowance, \$965; proportion awarded, \$757.34.

No. 31. Case of the ship *Eric*, of Newport, Rhode Island. Claimants, John G. Whitehorne, surviving partner of John G. and Samuel Whitehorne; Charles Devens, John S. Langley, John Stevens, William Littlefield, Samuel Allen; Benjamin Weaver, surviving partner of Solomon G. and Benjamin Weaver; George Hall; Henry Bull, executor of Henry Bull; Augustus Bush and John T. Bush, executors of Thomas Bush; Stanton Peckham and John B. Weeden, administrators of Isaac C. Peckham; Peleg Clarke and Josiah S. Munro, assignees of Russell Coggeshall; and Edward W. Lawton—by Edward W. Lawton, their attorney in fact. Memorial filed March 3, 1852. Allowance, \$1,138.83; proportion awarded, \$878.58.

No. 32. Case of Lemuel Wells. Memorial filed March 17, 1852; amount claimed, \$1,823.65. Rejected on the same ground as No. 28.

No. 33. Case of the ship *Cincinnati*. Claimant, Jacob Barker. Memorial filed May 6, 1852. Claim rejected for "total absence of evidence to support it."

No. 34. Case of the brig *Laine*, of Salem. Claimant, T. Perkins Pingree. Memorial filed May 26, 1852. Claim for anchorage dues illegally exacted. Allowance, \$53.30; award, \$41.11.

No. 35. Case of the bark *Wave*. Claimant, F. G. Frothingham. Memorial filed June 8, 1852. Claim for a fine illegally imposed. Rejected on same ground as No. 1.

No. 36. Case of the schooner *Amazon*, of New York. Claimants, Benjamin Roberts, president, and William Whitlow, jr., Duncan P. Campbell, John B. Cazeau, Francis Barretto, Elisha Riggs, and Richard M. Lawrence, surviving directors of the New York South American Steamboat Association, etc. Memorial filed June 9, 1852; amount claimed, \$107,812.84, with interest at 7 per cent from March 4, 1829. Allowance, including interest, \$30,229.80; award, \$23,321.73.

No. 37. Case of the cargo of the *Amazon*. Memorials were filed as follows: Benjamin W. Rogers, assignee of Le Roy Bayard & Co., June 29, 1852, \$2,600, with interest; John B. Cazeau, for himself and another, June 29, 1852, \$5,648.47, with interest; Peter H. Vandervoort, administrator of Peter L. Vandervoort, June 29, 1852, \$1,139.45, with interest; John J. Boyd, for himself and another, June 29, 1852, \$10,816.10, with interest; Elisha Riggs, by his agent, James Bolton, June 29, 1852, \$2,844.65, with interest; B. W. Rogers, for himself and others, June 29, 1852, \$6,397.98, with interest. The claim was dismissed "because the invitation and promise given by the chargé d'affaires of the Imperial Government of Brazil near the Government of the United States to the New York South American Steamboat Association to navigate the river Amazon did not amount to a grant by the said imperial government to the stockholders of said association or to any other persons of the right to traffic in merchandise along the coasts of said river."

No. 38. Case of the brig *Orient*. Claimant, Hyman Gratz, president of the Pennsylvania Company for Insurance, etc. Memorial filed June 22, 1852; amount claimed, \$264.11, with interest, for customs duty illegally exacted. Allowance (with interest at 6 per cent), \$506.65; award, \$390.87.

The list of money awards was as follows:

Nathaniel Hamlin and Parker H. Pierce .....	\$15,008.19
Richard S. Stewart, executor of George Law .....	24,273.22
Richard S. Stewart, administrator of Samuel Rose .....	33,050.03
Marcia Kennedy, administratrix of John F. Kennedy .....	17,423.49
John Gardner, assignee of Samuel Clapp & Co .....	3,389.08
Thomas P. Pingree .....	2,506.90
William Burroughs .....	18,344.12
William W. Harper, administrator of Samuel B. Harper .....	872.08
Putnam J. Farnham, Jed Frye, George D. Phippen, administrator of Peter E. Webster, and John Bertram .....	14,229.60
Catherine E. Massicott, executrix of William Massicott .....	1,810.65
Alexander C. and Richard Mitchell .....	8,837.02
George M. Bunker, administrator of James Bunker .....	5,203.79

Eliza B. Coffin, administratrix of Jared Gardner .....	\$4, 418. 51
Sophia Barrett, administratrix of George Barrett .....	4, 418. 51
William B. Coffin and Reuben Swain, 2d, executors of John Swain .....	4, 418. 51
Nathaniel Barney, administrator of Valentine Swain .....	4, 418. 51
Deborah Brayton, administratrix of Robert Brayton .....	2, 209. 26
Tristram Starbuck .....	2, 209. 26
Benjamin F. Gardner, administrator of James Gwin .....	2, 209. 26
Barzillai Luce, or his legal representative .....	1, 925. 09
Frederick Swain, or his legal representative .....	1, 418. 50
Alexander Macy, or his legal representative .....	1, 122. 97
William Husey, or his legal representative .....	1, 122. 97
James Swain, or his legal representative .....	980. 05
John Whitney, or his legal representative .....	673. 78
James Osband, or his legal representative .....	634. 15
David Young, or his legal representative .....	634. 15
John S. Coffin, or his legal representative .....	634. 15
William Steward, or his legal representative .....	634. 15
Lewis Dixon, or his legal representative .....	634. 15
George Butterfolk, or his legal representative .....	598. 92
John Luya, or his legal representative .....	598. 92
Thomas Wood, or his legal representative .....	598. 92
Robert Cathcart, or his legal representative .....	598. 92
Henry Dunsard, or his legal representative .....	598. 92
Thomas Russell, or his legal representative .....	567. 39
Charles Barnard, or his legal representative .....	567. 39
Peter Green, or his legal representative .....	567. 39
Reuben Bowers, or his legal representative .....	449. 19
Richard J. Arnold, Edward A. Russell, Samuel Russell, Charles F. Tillinghast, executor of Radcliffe Hicks, deceased, and William E. Talbot .....	1, 203. 34
John S. Wright, and Mary H. Houghton, administratrix of Henry A. Houghton .....	11, 208. 30
James Devereux .....	151. 98
John Devereux .....	153. 69
Andrew Foster and George T. Elliott, surviving partners of Andrew Foster & Sons .....	445. 87
Francis A. Gray, surviving partner of Francis A. and Samuel C. Gray .....	1, 121. 29
Fortunato J. Figueira .....	23, 651. 04
Henry May, administrator of Francis W. Dominick .....	29, 822. 19
William Wolfe .....	1, 658. 88
Nalbro Frazier .....	8, 741. 80
William Hammond .....	8, 741. 80
Wilhelmina de Valangin, sole surviving administratrix of Albert P. de Valangin .....	4, 370. 90
Henry Lewis, administrator of Stephen J. Lewis .....	11, 551. 94
James Ellison, executor of Joseph Baker, deceased, Henry Baker and John W. Geyer .....	8, 741. 79
James Smith .....	757. 34

Edward W. Lawton, in his own behalf, and as attorney in fact and trustee for John G. Whitehorne, surviving partner of John G. and Samuel Whitehorne, Charles Devens, John S. Langley, John Stevens, William Littlefield, Samuel Allen, Benjamin Weaver, surviving partner of Solomon G. and Benjamin Weaver, George Hall, Henry Bull, executor of Henry Bull, deceased, Augustus Bush and John T. Bush, executors of Thomas Bush, deceased, Stanton Peckham and John B. Weeden, administrators of Isaac C. Peckham, deceased, Peleg Clarke and Josiah S. Munro, assignees of Sanford Bell, and Russell Coggeshall.....		\$878. 58
T. Perkins Pingree .....		41. 11
Benjamin W. Rogers, president; William Whitlock, jr., Duncan P. Campbell, John B. Cazeau, Francis Barrett, Elisha Riggs, and Richard M. Lawrence, surviving directors of the New York South American Steamboat Association in trust for the said association and for themselves and the other shareholders of said association .....	23,321. 73	
Hyman Gratz, president of the Pennsylvania Company for Insurance, etc.....		390. 87
Patrick Barry Hayes, administrator of Isaac Austin Hayes ....		771. 48

The foregoing list is attested June 30, 1852, as correct, by George P. Fisher, commissioner, and Charles Howard Edwards, clerk.

## CHAPTER J.

### THE CHINESE INDEMNITY: CONVENTION BETWEEN THE UNITED STATES AND CHINA OF NOVEMBER 8, 1858.

On the night of December 14, 1856, the foreign factories at Canton were burned and foreigners were compelled to flee the city; and on the 13th of the next month all foreigners were forced to abandon Whampoa, the port of Canton. These incidents were the result of the hostilities between China and Great Britain growing out of the controversy concerning the *Jorchu Arrow*<sup>1</sup>—a controversy which served to inflame the feelings of the Chinese against all foreign residents. "The destruction of the foreign settlements at Canton, although apparently the act of incendiaries," was "known to have been arranged by the authorities of Canton, who made no distinction between enemies and neutrals; and the subsequent proceedings of the Canton government in offering rewards for the heads of all foreigners indiscriminately," were, together with the preceding acts of injury, considered as making the "provincial government and consequently the imperial government responsible to the fullest extent."<sup>2</sup> American citizens having thus been "obliged to leave Canton and Whampoa to save their lives from the indiscriminate fury of the populace, supported by the authorities," claims for their losses in consequence of the destruction of their property and the interruption of their business were preferred by the United States against China. These claims were made the subject of negotiation by Mr. William B. Reed in 1858. In the negotiation of his treaty of amity and commerce with China in that year he endeavored to secure the insertion of an article in relation to claims. The Chinese plenipotentiaries refused to admit it, and he subsequently proposed an arrangement whereby the claims might be gradually liquidated without any open acknowledgment of imperial liability. This end was to be accomplished by devoting a certain proportion of the duties collected on American goods and bottoms at three treaty ports to the payment of the American claims. To this proposal the Chinese plenipotentiaries assented, and it was agreed by means of an exchange of notes that a fund of 600,000 taels, or about \$840,000, should be raised in the manner described.<sup>3</sup> In this agreement, however, there were certain elements of inconvenience and uncertainty. It was provided that in the adjudication of claims, and especially of those at Canton, the Chinese Government should be represented by an officer appointed to act for it. This provision was thought

<sup>1</sup> McCarthy's Short History of Our Own Times, 164.

<sup>2</sup> H. Ex. Doc. 29, 40 Cong. 3 sess. 152.

<sup>3</sup> S. Ex. Doc. 30, 36 Cong. 1 sess. 371.

to involve delay, if nothing more. Besides, no apportionment was made between the three treaty ports of the proportions of duties to be reserved in them, nor was any specification made of the time at which the agreement was to take effect, except the contingent one of the restoration of business at Canton. These features of the agreement caused Mr. Reed to desire its modification. He wished to make it more precise in its terms, as well as to give it the solemnity of a conventional form. On November 8, 1858, therefore, he signed at Shanghai a convention by which, though he accepted 500,000 taels, or \$735,238.97, instead of 600,000 taels, in settlement of the claims, he obtained an exact apportionment of the fund among the ports of Canton, Shanghai, and Fuh-chau, together with a provision for the issuance of debentures by the collectors of customs on the first day of the next Chinese year.

The distribution of the fund was committed to a board of two commissioners, from whose decision an appeal was allowed to the minister of the United States in China.<sup>1</sup> As commissioners the President appointed, by and with the advice and consent of the Senate, Mr. Charles W. Bradley, United States consul at Ningpo, and Mr. Oliver E. Roberts, "late vice-consul at Hongkong." According to the designation of time made by Mr. John E. Ward, then minister of the United States in China, the commissioners met at Macao November 18, 1859. They caused a notice of their meeting to be published in the *China Mail*, of Hongkong, and ordered all claims to be filed before December 15, 1859. They concluded their labors January 13, 1860. In most cases they came to a decision, and in every case in which they made a joint report it was approved by Mr. Ward. The total amount of the claims presented was \$1,535,111.35. The claims allowed in full amounted to \$75,506.83; those allowed in part amounted, so far as allowed, to \$414,187.95. The whole amount allowed was, therefore, \$489,187.95. The claims that were wholly disallowed amounted to \$273,783.43. As the fund amounted to \$735,238.97, there was a surplus left, after paying the awards, of nearly \$250,000.

Some of the claims as at first presented to the board were afterward reduced "to a considerable extent by the recovery of property supposed to be lost, or by its honorable restitution by some of the principal Chinese merchants who had taken charge of it during the emergency." The board made it a rule to allow only "claims for actual losses, understanding by these words losses of actual property existing at and before the conflagration at Canton." "Besides these losses there have been," said the commissioners, "losses arising from the interruption of business by reason of the circumstance of hostilities, which may be called real losses in one sense; but these have been in every case disallowed, as well as all constructive and speculative losses of every kind. In disallowing all claims except those for destruction of actual property, we have followed the rule laid down by the Supreme Court of the United States and the usages of governments in similar cases."<sup>2</sup>

<sup>1</sup> Act of March 3, 1859, 11 Stats. at L. 408.

<sup>2</sup> Report of Messrs. Bradley and Roberts, January 13, 1860, H. Ex. Doc. 29, 40 Cong. 3 sess. 151-152.



The commissioners allowed interest at the rate of 12 per cent per annum on the claims from the time of their origination to December 15, 1859, in most cases a period of three years. They were induced to give this liberal rate by consideration of the fact that some time must elapse before the complete collection of the indemnity through the Chinese custom-houses could be effected; and they intended to make their awards a final settlement of the question of interest.

In their final report the commissioners referred to the Case of the "*Caldera*," case of the *Caldera* as having been settled by the decision of the American minister. This case involved a delicate question as to the responsibility of the Chinese Government, and gave rise to more discussion than any other claim before the board.

The Chilean bark *Caldera*, Matthew Rooney, master, sailed from Hongkong for San Francisco October 5, 1854. On the 7th of the same month the bark, having encountered a typhoon, was compelled to put into a bay near Keelan, about 70 miles southwest of Hongkong, within the jurisdiction of China. Here she was pillaged by four successive bands of pirates, one of which consisted of a large fleet of piratical junks which took away her cargo. The bark and a large part of the cargo were insured by American underwriters. Other parts of the cargo, belonging to Messrs. Alvord & Co., American merchants at Canton, and Matthew Rooney, were not insured. The case was brought to the attention of the Chinese authorities, and through their exertions a small part of the cargo was recovered, while some of the dwellings and junks of the pirates were destroyed. The Chinese authorities declined, however, to entertain a claim by the American underwriters for reparation for the destruction of the bark and for unrecovered portions of the cargo; and Mr. McLane, then American commissioner to China, accepted their view. The Department of State at Washington, on the other hand, instructed Mr. Parker, Mr. McLane's successor, to demand indemnity on the ground that the case involved an "aggravated wrong," though it might not come within the express provisions of the treaty between the two countries. Subsequently, the Department of State maintained that the treaty had been violated. By Article XXVII. of the treaty of 1844 it was provided that if any vessel of the United States should "be wrecked or stranded on the coast of China, and be subjected to plunder or other damage, the proper officers of government, on receiving information of the fact, will immediately adopt measures for their relief and security." It was alleged that this engagement "was wholly disregarded by the Chinese Government in the present case; that the local authorities participated in or connived at the acts of plunder; and that the higher authorities took no measures of relief and security."

There was also another stipulation of the treaty which was invoked by the United States. Article XXVI. provided as follows:

"If the merchant vessels of the United States, while within the waters over which the Chinese Government exercises jurisdiction, be plundered by robbers or pirates, then the Chinese local authorities, civil and military, on receiving information thereof, will arrest the said robbers or pirates, and punish them according to law, and will cause all the property which can be recovered to be placed in the hands of the nearest consul or other officer of the United States, to be by him restored by the true

owner. But if, by reason of the extent of territory and numerous population of China, it should in any case happen that the robbers cannot be apprehended, or the property in part only recovered, then the law will take its course in regard to the local authorities, but the Chinese government will not make indemnity for the goods lost."<sup>1</sup>

The United States admitted that under this article the Chinese Government "might discharge itself of the obligation of indemnity by showing that the robbers could not be known to be apprehended or that the property could only be in part recovered." But attention was called to the fact that in the case of the *Caldera* the claimants "alleged that the property plundered was notoriously visible and accessible to the local authorities; that the latter participated in the plunder; that the robbers were known as such to the local and general authorities; and that the pirates concerned in it were, shortly afterward, with full knowledge, taken into the service of the imperial government."<sup>2</sup>

In due course a claim was made before the present board by the American underwriters, and by the Messrs. Alvord & Co., and Matthew Rooney. The commissioners differed in opinion on the claim, Mr. Bradley holding that it should be rejected, while Mr. Roberts maintained that it should be allowed in part.

Mr. Bradley argued that the case was a simple one of piracy on the high seas, and that, even assuming that the phrase "merchant vessels of the United States" would cover a Chilean vessel carrying a cargo belonging to citizens of the United States, the Chinese Government had completely discharged its obligations under the treaty. He maintained that the Chinese Government had been diligent in its efforts to detect and punish the pirates; that the alleged complicity of one or more native officers in the plundering of the bark was "neither proved nor shown to be fairly presumptive," and that there was no legal evidence that the pirate fleet had united with the imperial forces. It was well known, said Mr. Bradley, that piracy was and from time immemorial had been the normal condition of all the eastern seas. The character of the southern shores of China, with their countless islands and inlets, their intricate passages and obscure harbors, rendered that quarter a favorite resort for piratical outlaws and made their extirpation a work of no common difficulty, while the extreme poverty of the lower classes and their habits of aquatic life greatly promoted the perpetuation of the gangs. But it by no means followed that China was a piratical or semipiratical state, and as such answerable for acts of a piratical character. By her legislation she had treated piracy as a capital crime, and had suitably provided for its detection and punishment; and every year hundreds of freebooters suffered the extreme penalty of the law in the southern provinces as pirates. The imperial navy, such as it was, had been kept up chiefly for the suppression of piracy, and the cooperation of men-of-war of the United States and Great Britain in the matter had been welcomed. Under the circumstances the argument employed by Mr. Webster in the case of *McLeod* would apply to China in respect of piracy. In that case Mr. Webster, while denying any delinquency on the part of the United States in suppressing disorders along

<sup>1</sup> H. Ex. Doc. 29, p. 10.

<sup>2</sup> Mr. Cass, Sec. of State, to Mr. Ward, minister to China, May 5, 1859, H. Ex. Doc. 29, 40 Cong. 3 sess. 9.

the Canadian border, argued that because of "the extent of frontier" to be guarded, "irregularities, violences, and conflicts" would "sometimes occur, equally against the will of both governments;" that such things would be more likely to happen in regard to the United States, because of its abstinence from maintaining large standing armies in time of peace; and that all that could be expected from either government was "good faith, a sincere desire to preserve peace and do justice, the use of all proper means of prevention," and, if measures of prevention should fail, the punishment of the offender. Continuing, Mr. Bradley said:

"With the same justice and propriety might the imperial prime minister adopt this language in reference to the cause of the pending suit. And it would be equally as reasonable, too, if he, on the part of his government, should, under the 16th article of the treaty of Wanghia, or the 24th article of the treaty of Tientsin, demand indemnity to his fellow-subjects for fraudulent acts committed against them by citizens of the United States, or for moneys due them by our deceased, bankrupt, or absconding debtors—notwithstanding the former of these expressly declares that 'if citizens of the United States be indebted to subjects of China, the latter may seek redress in the same way (i. e. by suits at law in the consular courts), through the consul, but without any responsibility for the debt on the part of the United States.' It is just as clearly stipulated in Article XXVI. of Wanghia (Article XIII. Tientsin) that 'the Chinese Government will not make indemnity for the goods lost' by piratical depredations on our commerce.

"It is a mortifying fact that, were a balance to be struck between the aggregate losses suffered by Americans from Chinese pirates, Chinese thieves, and Chinese debtors, on the one hand, and on the other the injuries inflicted on Chinese merchants, tradesmen, compradors, and citizens, in the non-payment of debts honestly due them by American merchants, agents, shipmasters, mariners, etc., we should find that balance to our debit in a ratio of full ninety per cent. I speak advisedly.

"On the score, too, of official fidelity and punctuality in fairly carrying out their treaty obligations as against their own countrymen, I apprehend that the consular officers of America and Europe have been guilty of quite as many and as serious laches as can be produced against the native magistracy of China, in their official shortcomings towards foreigners. Such, at least, is the result of my observation.

"Due provision is also made by the Code of Statutes and Ordinances for the punishment of malfeasance on the part of officers. \* \* \*

"These statutes cover the whole ground of official torts, and are frequently enforced with exemplary impartiality and rigor.

"In view of the facts herein set forth, I cannot perceive that the Government of China has failed to carry out its treaty obligations in the protection of American interests against piracy to the best of its ability; and as 'a treaty is the law of the land, its provisions must be regarded by courts as equivalent to an act of the legislature, when it operates directly on a subject,' as here. (Foster vs. Neilson, Peters, VIII. 188.)

"A decision in favor of the claimants will be unprecedented. The case of Messrs. Nott & Co., asking for indemnity for loss of treasure shipped per *Nera*, at Hongkong, and taken by pirates on the coast, in October 1857 (a case, in every material point, precisely similar to that of the *Caldera*) has been already rejected by the board; and it is not easy to discover any good reason why the one should be refused and the other allowed. Numerous like instances have, within the last seventeen years, occurred in the waters over which China exercises jurisdiction, for which neither British nor American underwriters have ever asked indemnity. \* \* \* Piracy is one of the risks against which they insure; and it would be as reasonable to insist on Chinese indemnity for losses occasioned by Chinese typhoons as for those by Chinese pirates; and the award which the plaintiffs seek would, if allowed, constitute such a precedent as would involve the governments of the United States and China in per-

petual disputes. That 'it is dangerous to introduce new and dangerous things,' is a sound maxim of the common law.

"That a portion, at least, of the underwriters of the *Caldera* think her a bad subject for indemnification, might be inferred from the fact that they have parted with their interests in the ship and cargo, for 'a valuable consideration,' and have thus thrown them into hands speculating on recovery.

"My opinion is, that the parties interested in the case of the *Caldera* are entitled to no award, either on principles of usage, equity, or of international law."<sup>1</sup>

Mr. Roberts maintained that the claims in the case of the *Caldera* were "based upon substantial justice as well as the usages of nations;" but before discussing the merits of the case he examined the preliminary question whether, in view of the fact that the vessel was Chilean, the American underwriters had a standing before the commission. It was settled, said Mr. Roberts, that where a vessel and cargo, being in a perilous position, were abandoned as for a total loss, and such abandonment was accepted, the underwriters became the owners of the property, whether it was saved or lost. Such being the law, it was tacitly admitted by the mixed commission which sat in London in 1853 that the underwriters acquired by the same process all the rights of reclamation against foreign governments which the insured possessed (the reference here was to the cases of the *Enterprize* and *Hermosa*, *supra*, 419), and if the *Caldera* had been an American vessel this rule would have operated to the full extent. But as the *Caldera* was a Chilean vessel, it could not be safely asserted that any rights of reclamation against China, in regard to the vessel and that part of the cargo not originally owned by the Americans, passed to the underwriters, "except such as the Chilean republic might urge under its own relations with China, by treaty or otherwise."

Proceeding, Mr. Roberts said:

"This right of reclamation, whatever it might be worth intrinsically, or whatever might be the limitations imposed upon it by the relations of the Chilean republic to China, became *bona fide* American property by the usages of commerce, and may properly be brought before an American commission and adjudicated upon according to the treaty which applies to the case, if any such treaty be in existence. The Chilean republic has no treaty with China, and its reclamations against China must therefore rest, not on special stipulations, but on the principles of justice and international law. The American owners of the right of reclamation, thus limited, would have no right to press it upon China under the American treaty, in case that treaty contained any stipulations of indemnity which had not already been conceded to Chile or which would not necessarily be conceded upon the principles of international law. As a matter of fact, the United States have not and it is extremely improbable that any civilized nation ever will obtain from China, in regard to piracy, any stipulations of indemnity which other nations would not of right possess without a treaty.

"It is obvious also that this claim could not be presented through the Chilean legation, if any existed, because no Chilean citizen had any interest in the matter whatever. The rule adopted by the American and British legations to admit claims only for property belonging to their countrymen, respectively, would require any Chilean representative to decline to entertain this claim, and to refer it back to the United States legation or commission. Further, this argument in favor of the underwriters' right to appear is founded on natural justice, for the original owners of the hull and cargo have been once paid for their losses already. They make no

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<sup>1</sup> H. Ex. Doc. 29, 40th Cong. 3 sess. 176.

claim, because they do not expect to be paid twice. Supposing the Chinese government bound to pay anybody, it is clear that the payment should be made to the only parties who have lost anything. The underwriters and one firm uninsured are now the only parties who have lost.

"I propose to consider the main question of the responsibility of the Chinese Government in this case by inquiring—

"1. Whether the treaty of 1844 prohibits this claim.

"2. Whether the same treaty supports the claim either expressly or by inference.

"3. I shall then consider the subject under international law, independently of the treaty; and,

"4. Discuss some popular objections to this claim.

"1. Piracy has prevailed on the coast of China for centuries. It has assumed two forms. The first may be said to be a normal condition of piracy existing among the villagers and fishermen who dwell along a line of coast extending two thousand miles.

"When a vessel is stranded in their neighborhood, they come forth to plunder it, and then retire to their usual occupations. To-day they are fishermen or agriculturists; to-morrow they are pirates as occasion serves. They number many millions probably, and their predatory habits arise from their moral condition, for which no government can be held responsible. It is difficult to see how force could be advantageously applied against this thievish population, unless when engaged in some overt act of robbery. On a recent occasion a stranded steamer was surrounded by seventy boats, containing each six to ten men armed with swords and spears. To this normal condition of piracy on the coast, the treaty of 1844 justly applies. Due regard was had to the extent of the coast, the difficulty of preventing the robberies, and the ease with which the thieves might escape with their plunder, and all trace of them be lost among the myriad population dwelling in innumerable villages. Every possible leniency was shown to the weakness of the Chinese Government or empire. The 26th article of the treaty of 1844 declares, in regard to piracy, as follows: 'But if, by reason of the extent of territory and numerous population of China, it should in any case happen that the robbers cannot be apprehended, or the property only in part be recovered, then the law will take its course in regard to the local authorities, but the Chinese Government will not make any indemnity for the goods lost.' Nothing could be more reasonable than such a provision, however much we may deplore the condition of things which the treaty contemplates.

"On the other hand, we find frequently on the coast of China great piratical fleets. These have sometimes assumed political importance, and even acquired historical celebrity. The piratical fleet at Koelan numbered 78 large junks, containing probably one hundred men each. The expeditionary force met twenty rebel boats, carrying, as they reported, one hundred men each. The piratical fleet was in fact a great navy approximating to the dimensions of the United States navy in number of vessels and men, though of course no comparison can be instituted in respect to courage or efficiency. It is probable that the shore population in league with the fleet equaled in number the piratical crews. It is difficult to see how the terms of the treaty of 1844 can apply to this tremendous piratical organization. It is difficult to see how the 'extent of territory or numerous population of China' could afford any excuse to the Chinese authorities. The existence of such a fleet must have been known to Governor Yeh. This is clearly proved by the fact that the imperial squadron near Koelan was negotiating with the pirates. The proceedings of such fleets cannot be concealed. They generally range over some hundreds of miles, devastating as they go. No extent of coast could give obscurity to such a fleet as that which chose Koelan for its home and depot. Neither could the 'numerous population of China' allow 78 great junks and 6,000 to 8,000 men to hide away as a thief in a crowd. If, therefore, the Chinese authorities took no measures against the Koelan fleet, either before or after the piracy on the *Caldera*, they cannot be excused (in the terms of the treaty) 'by reason of the extent of the territory or the numerous population of China.'

"The terms of the treaty are utterly inapplicable to the facts regarding this great piratical organization. The treaty of 1844 pays regard to the weakness of the Chinese Government, and marks out, in my opinion, the exact limit within which that government cannot reasonably be held responsible. The circumstances of this case are entirely beyond that limit. I therefore conclude that the treaty of 1844 does not prohibit this claim.

"2. But we do not, on the other hand, find that the treaty supports the claim by any express stipulation. We have been referred to certain articles of the treaty which promise good treatment and protection to American citizens. I regard these as merely declaratory clauses in respect to that good treatment which all governments give to resident aliens. They are not guarantees of indemnity for losses by any ordinary felony, unless the government itself is guilty of collusion, gross neglect or some unwarrantable act purely official in character. But I am of opinion that if the treaty does not support the claim expressly, it does so by inference beyond a doubt. The felony was extraordinary, and the terms of the treaty no more apply to it than a statute against petty larceny applies to the filibusters who invaded Nicaragua. There was within the empire of China, at Koelan and its neighborhood, a quasi-independent piratical state or district, having a vast organization for predatory purposes. The imperial officers in command of the Chinese squadron succeeding in negotiating with the pirates, and buying up thirty junks, leaving forty-eight, which were afterwards destroyed by the foreign naval forces. Negotiation implies a certain independence in the party negotiated with. As for the remaining forty-eight junks, they feared nothing from the Chinese authorities. Conscious of strength, they enjoyed perfect security. The official report of their destruction states that they were hauled upon the shore, and it would have taken a week to get them afloat. They were accordingly burnt. The evidence before us shows that the existence of this piratical fleet was (as it always has been in similar cases) a matter of notoriety. The goods were seen in the towns and villages all along the coast. The junks which took away the cargo were large ones, armed with 32-pounders, and the crews evinced considerable discipline. Some of the cargo was found on board the large fleet, and I have no doubt the lion's share of the plunder was obtained by that fleet. It is, however, true that the *Caldora* was robbed by several parties of pirates, but they all thieved under the shadow of the great fleet, which bade defiance to the Chinese imperial squadron. I would here advert to the difficulty of getting positive evidence in cases like this. Had not the expedition, consisting mainly of British forces, gone against Koelan, we should be deprived of much light which has been thrown on this subject. It is not proved, but it is improbable, judging from what we know of Chinese officials in connection with piracy, that the thirty junks who joined the imperial squadron did so because they knew the foreign forces were coming. They may have carried a portion of their plunder with them and divided it with the imperial officers. In fact, the proceedings of Chinese officials in such cases afford no ground for disbelieving any allegations which the claimants make. But the proof of some minor matters (not necessary however, in order to arrive at a conclusion) is somewhat imperfect.

"In regard to the 26th article of the treaty, on the strength of which Governor Yeh and Mr. McLane rejected this claim, Mr. Cass, Secretary of State, stating some points hypothetically, says: 'Undoubtedly it (the Chinese Government) might discharge itself of the obligation of indemnity by showing that the robbers could not be known to be apprehended, or that the property could only in part be recovered.' We have already proved that the pirates were very well known, and if the goods were not recovered, it was owing to the impudent strength of the pirates and not to concealment. The inference is that the obligation of indemnity remains perfect. The obligation rests on the express stipulation that the Chinese Government will arrest and punish the robbers, and recover the goods, if accessible and visible. The goods being visible, and the robbers accessible, I infer the liability of the Chinese Government.

"3. If we regard the subject from a point of view under international law, we shall find that the piratical state of Koelan was within the jurisdiction of China, and the Chinese Government is responsible for its condition, although the piracy was not directly an act of the Chinese Government, or adopted by it in a direct manner.

"In regard to this piratical *imperium in imperio*, the Chinese Government might take several courses. They might suppress the pirates by energetic action, as they were bound to do; they might merely make an indemnity for any losses inflicted on foreign commerce; they might leave foreign nations to take indemnity by reprisals, or take redress by bombardment (after a refusal of indemnity by the Emperor), as has been done in times past against the Barbary States or savage islands in the Pacific Ocean. It is well to note here that the expedition against Koelan was not on account of this claim. The expedition went to recover the goods and chastise the pirates, as such, and not as subjects of China. Two mandarins accompanied the force as a manifestation of its peaceful character toward China and its government. Everything appears to have been done with international courtesy and politic circumspection.

"In this case, the emperor has decided to make an indemnity, if it is due; that is, by agreeing to a convention of claims. He has made arrangements to pay this claim contingently upon its adjudication.

"4. I have now to consider certain objections to this claim of a popular nature, and shall do so briefly. It has been asserted that it has always been the custom of the Chinese Government to suppress pirates, banditti, and insurrections, by buying up the leaders, and giving them pardon and promotion to office, even among the people whom they have robbed. It is sufficient to say that iniquity of this sort cannot plead custom. We have no reason to complain of the internal customs of China, but when those customs encourage piracy, which infringes our foreign commerce, the mildest redress which can be demanded is a pecuniary indemnity.

"If we consider the weakness of the Chinese Government an excuse in this case, we set aside the treaty, give immunity to the Koelan pirates, establish piracy by law, and issue in spirit, if not in fact, a roving commission to pirates to prey on American commerce, provided, for the time being, they are strong enough to be unusually audacious. It is not competent for this commission to regard these popular considerations. Commiseration for China is a point for the consideration of the United States Government when it makes treaties with China. On the other hand, the claimants are entitled to commiseration, for they have lost their property by a violent crime hostile to all human interests. They are entitled to all the equity which the facts of the case can possibly give. Their loss has been absolute and without contingency or construction.

"Equity, however, requires that the allowance of the claim should be made with a deduction. The underwriters and others should not be placed in a better position than if no piracy had occurred. The ship suffered heavily in the hurricane, and a large claim on the insurance offices would have been made. The vessel had four feet of water in the hold, and had been much strained. The masts, sails and rigging had been nearly lost before the pirates came alongside. It is impossible to say now what the exact amount of repairs, salvage, or general average would have been, or what portion of the cargo was damaged by the water in the hold or other leakage. After considering all the circumstances and taking testimony, I deem it just to allow but forty per cent. of the claim of the policy covering the hull, and the same on the policies covering the cargo, with five years' interest, at twelve per cent, to the underwriters in the United States. A separate document will be submitted, showing the amount due the claimants respectively. The rejection of this claim in 1854 (on ground which, in my opinion, overlooked the marked distinguishing features of it) has necessitated a careful review. I have endeavored to view the subject as if it were now presented for the first time. I have regarded it merely as a legal question, which requires a judicial solution, according to the best of my ability."

The report of Mr. Roberts was adopted and affirmed by Mr. Ward, and under the decision thus made the underwriters received \$47,542.62, and Messrs. Alvord & Co., \$7,023.52. The claim of Rooney, the master of the bark, was disallowed for want of proof of his American citizenship. Subsequently, such proof having been made, Mr. Burlingame allowed his claim to the amount of \$3,040.<sup>1</sup>

The claimants being dissatisfied with the amount allowed under the decision of the board, Congress, by an act of June 9, 1878, referred the case to the Court of Claims. This tribunal rendered a decision in favor of the claimants, and on May 7, 1881, the decision of the Court of Claims having been affirmed by the Supreme Court, the Secretary of State paid out the sum of \$113,077.11 in satisfaction of the judgment.

In the case of the *Caldera* reference has been made to **Claim of Nott & Co.** the claim of Nott & Co., which was disallowed by the commissioners. It appeared that on October 16, 1857, Nott & Co., American merchants at Hongkong, shipped four boxes of specie, valued at \$16,197.60, on board the British schooner *Nera*, at that port. The schooner sailed on the afternoon of the 17th of October, and during the evening, while she was lying at anchor at a short distance from the limits of the harbor, five Chinese came alongside and requested passage to Foochoo. At about 11 o'clock at night these supposed passengers, assisted by some Chinese members of the crew, took possession of the vessel, murdered the captain and some of the seamen, and seized the treasure on board. They subsequently escaped to the mainland near Mira Bay. The remaining members of the crew brought the vessel back to Hongkong and made a report of the occurrence. The claimants alleged that the local authorities did not exert proper diligence for the apprehension of the culprits and the recovery of the treasure; but owing, it was said, to the absence of their age. In the northern part of China when the claim was rejected by the commissioners at Macao, they failed to take an appeal to the minister of the United States, Mr. Ward, and the decision of the commissioners was affirmed. Subsequently they sought to obtain payment of their claim from the United States out of the surplus of the fund,<sup>2</sup> and by an act of February 22, 1869, the case was referred to the Attorney-General. On the 3d of the next month he rendered an opinion in favor of the claimants, under which the Secretary of State paid them the sum of \$38,242.53, which included interest up to the date of the Attorney-General's opinion.

It seems that when it was ascertained that a surplus would remain after the payment of the claims allowed by the board, the return of the money was proposed,

but the Chinese Government declined to accept it.<sup>3</sup> In his annual message of 1860, President Buchanan suggested that, as the remainder of the fund would in equity belong to that government, it should be appropriated "to some benevolent object in which the Chinese may be specially interested." President Lincoln in his first annual message repeated this suggestion, but added that if it should not be adopted, the money might be invested as a

<sup>1</sup> H. Ex. Doc. 29, 40 Cong. 3 sess. 189.

<sup>2</sup> H. Ex. Doc. 29, 40 Cong. 3 sess. 206.

<sup>3</sup> H. Ex. Doc. 29, 40 Cong. 3 sess.



fund for the satisfaction of claims against China which might arise in the future.

In 1863 Mr. Burlingame proposed that the money should be used for the establishment of an educational institution at Peking. No action, however, was taken by Congress on the subject, and in 1867 the money was ordered to be remitted to the United States.<sup>1</sup> This was done, and the money was duly invested. Out of the fund thus created the subsequent allowances in the case of the *Caldera* and Nott & Co. were paid. Finally, by an act of March 3, 1885, Congress directed the Secretary of State, after deducting the sum of \$130,000, which was to be paid to the executors of Charles E. Hill in satisfaction of his claim against the Chinese Government for the use and loss of the steamer *Keorgeor*, to turn over the remainder of the fund, together with the increment derived from its investment, to China. In accordance with this direction the Secretary of State on April 24, 1885, paid to the Chinese minister at Washington the sum of \$453,400.90. In acknowledging its reception the Chinese minister said: "This generous return of the balance of the indemnity fund by the United States to China can not fail to elicit feelings of kindness and admiration on the part of the Government of China toward that of the United States, and thus the friendly relations so long existing between the two countries will be strengthened."<sup>2</sup>

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<sup>1</sup> Mr. Seward, Sec. of State, to Mr. Burlingame, April 5, 1867, H. Ex. Doc. 29, 40 Cong. 3 sess. 17.

<sup>2</sup> Treaty Volume, 1259; For. Rel. 1885, p. 183.



## CHAPTER K.

### THE "ALABAMA" CLAIMS COURTS.

#### I. THE FIRST COURT.

Constitution of the  
Court.

For the "adjudication and disposition" of the mon-  
eys received under the Geneva award Congress, by an  
act approved June 23, 1874,<sup>1</sup> authorized the President,  
by and with the advice and consent of the Senate, to appoint "five suit-  
able persons" who should constitute a court to be known as the "Court of  
Commissioners of *Alabama* Claims." It was provided that the President  
should designate, by appointment, one of these judges to be presiding  
judge of the court; that each of the judges and other officers of the court  
should take the oath of office prescribed by law to be taken by all officers  
of the United States; and that all vacancies which might occur in the  
court by reason of death, resignation, or inability or refusal or neglect  
of any of the judges to discharge the duties of his position, should be  
filled in the same manner as vacancies occurring in offices under the Con-  
stitution of the United States. It was further provided that the judges  
should meet and organize the court in the city of Washington, where its  
sessions should be held; that three of the judges should constitute a  
quorum for the transaction of business; and that the agreement of three  
should be necessary to decide any question arising before the court.

In addition to the judges the act provided for the appointment by the  
President, by and with the advice and consent of the Senate, of a clerk.  
And in order that the interests of the government might be protected, the  
President was authorized to designate a counselor at law admitted to  
practice in the Supreme Court of the United States, to appear as counsel  
on behalf of the United States and represent it in all claims filed for  
indemnity, subject to the supervision and control of the Attorney-General.  
The court was authorized to appoint one shorthand reporter. The duty  
of serving the process of the court, executing its orders, and preserving  
order in the place of its sittings, was imposed on the marshal of the  
United States for the District of Columbia and his deputies.

The judges were required to meet in Washington as soon as might be  
convenient after their appointment, and the existence of the court was  
limited to one year from the date of its first convening and organizing.  
In case it should be found impracticable to complete the work within that  
period, the President was authorized by proclamation to extend the dura-  
tion of the court for not more than six months.

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<sup>1</sup> 18 Stats. at L. 245.

**Presentation and Disposition of Claims.** All claims were required to be verified by the oath of the claimant, and to be filed in the court within six months after its organization; and it was provided that all claims that should not be so filed should be held "to be finally and conclusively waived and barred." Immediately after its first meeting in Washington, the court was directed with all convenient dispatch to arrange and docket the several claims admissible under the act; to consider the evidence offered in support of and in opposition to such claims; and after allowing such time as might seem reasonable and just for the production of further evidence, to proceed to determine and render an award on each claim in accordance with the provisions of the act.

**Powers of the Court.** The powers of the court were duly defined. It was authorized to give public notice of its sessions and to make all needful rules and regulations for the government of its forms and mode of procedure, such rules to conform as far as practicable with the mode of procedure and practice of the circuit courts of the United States. It was invested with the same powers as the circuit and district courts of the United States to compel the attendance and testimony of parties, claimants and witnesses, to preserve order, to punish for contempts, and to compel the production of any books or papers deemed material to the consideration of any pending claim or matter. It was authorized to make orders or requisitions for the delivery to it of all records, documents, or other papers in the Department of State relating to the claims and necessary to their examination and adjudication. Each of the judges was authorized to administer oaths and affirmations, and to take the depositions of claimants, parties, and witnesses, in all matters pertaining to the presentation or examination of claims.

False swearing as to matters or facts material in the examination of claims was made punishable with the penalties of perjury.

**Jurisdiction of the Court.** By section 11 of the act it was made the duty of the court to receive and examine all claims "directly resulting from damage caused by the so-called insurgent cruisers *Alabama* and *Florida* and their tenders, and also all claims directly resulting from damage caused by the so-called insurgent cruiser *Shenandoah* after her departure from Melbourne on the 18th day of February 1865, and to decide upon the amount and validity of such claims, in conformity with the provisions hereinafter contained, and according to the principles of law and the merits of the several cases."

By section 12 this grant of jurisdiction was materially qualified by the following provisions:

1. That no claim should be allowed "for any loss or damage for or in respect to which the party injured, his assignees or legal representatives, shall have received compensation or indemnity from any insurance company, insurer, or otherwise;" but that, if such compensation or indemnity was not "equal to the loss or damage so actually suffered, allowance may be made for the difference."

2. That no claim should be allowed "for or in respect to unearned freights, gross freights, prospective profits, freights, gains, or advantages, or for wages of officers or seamen for a longer time than one year next after the breaking up of a voyage by the acts aforesaid."

3. That no claim should be allowed "by or in behalf of any insurance company or insurer, either in its or his own right, or as assignee or other-

wise, in the right of a person or party insured as aforesaid, unless such claimant shall show to the satisfaction of the said court that during the late rebellion the sum of its or his losses, in respect to its or his war risks, exceeded the sum of its or his premiums or other gains upon or in respect to such war risks; and in case of any such allowance, the same shall not be greater than such excess of loss."

4. That no claim should be allowed "arising in favor of any insurance company not lawfully existing at the time of the loss under the laws of some one of the United States."

5. That no claim should be allowed "arising in favor of any person not entitled, at the time of his loss, to the protection of the United States in the premises."

6. That no claim should be allowed "arising in favor of any person who did not at all times during the late rebellion bear true allegiance to the United States."

By section 13 of the act it was provided that, in estimating the compensation to be paid, interest at the rate of 4 per cent should in each case be allowed on "the amount of actual loss or damage" from such date as the court should decide that such loss or damage was sustained by the claimant; but it was also provided that the amount of such interest should not be included in or added to the amount for which judgment might be rendered on the claim, but that a report of the amount of such interest, certified under the seal of the court, should in each case accompany the report of judgment on the claim to the Secretary of State.

As it was known by the dissenting opinion of Sir Alexander Cockburn that the tribunal of arbitration allowed 6 per cent in gold on the amount which it found to be due, the provision that the court should allow interest only at the rate of 4 per cent indicates on the part of Congress an expectation that the payment of the "direct claims" would consume the whole fund. In its general provisions the act kept well within the lines of the award. Claims were restricted to the cruisers inculpated by the award, and the exclusion of claims for unearned freights, gross freights, and certain other matters was based upon its provisions.

In rendering its judgment it was provided that the court should, on motion of the attorney or counsel for the claimant, allow, out of the amount awarded, such fees as it should determine to be just and reasonable as compensation for the services rendered in prosecuting the claim, which allowance should be entered as part of the judgment in the case, and should be made specifically payable as part of the judgment; and for the sum so allowed the Secretary of the Treasury was directed to issue a warrant in favor of the person to whom the allowance was made. All other liens upon, or assignments, sales, or transfers in respect of any claim for services rendered before the judgment was awarded and the warrant issued, were declared to be null and void.

The court was required to report a list of its several judgments and decisions to the Secretary of State, and it was provided that the Secretary of State should, upon the conclusion of the business of the court, transmit a copy of such list to the Secretary of the Treasury, who should pay the judgments, together with interest at 4 per cent from the date certified, to the persons in

whose favor they were rendered, or to their legal representatives. But in case the sum of all the judgments, together with interest, should exceed the amount received into the Treasury as proceeds of the sum paid by Great Britain, it was made the duty of the Secretary of the Treasury to distribute the money among the claimants according to the proportions which their respective judgments should bear to the whole fund. The Secretary of the Treasury was directed to pay the judgment "out of any such money in the Treasury not otherwise appropriated," and for that purpose he was authorized to sell at public sale, at not less than par in coin, a sufficient amount of 5 per cent coupon or registered bonds, and from time to time, as the judgments were paid, to cancel the bonds mentioned in the act of March 3, 1873, to the amount of such payments. When all the payments were made, he was directed to cancel any such bonds as should remain; and if after the payment of the judgments and the reimbursement of the expenses of the court, any part of the money remained, it was provided that it should constitute a fund from which Congress might authorize the payment of other claims upon it.

The salary of each of the judges was fixed at the rate of \$6,000 per annum; that of the clerk at the rate of \$3,000, and that of the shorthand reporter at the rate of \$2,500; and it was provided that the court should "be further allowed the necessary actual expenses of office rent, furniture, fuel, stationery, and printing, and other necessary incidental expenses, to be certified by the presiding judge of said court, and to be audited and paid on vouchers under the direction of the Secretary of State." The counsel on behalf of the United States was allowed "for his services and expenses such reasonable allowance in each claim as may be approved by the court, to be apportioned in each claim adjudicated, and paid from said award upon the certificate of one of the judges."

June 24, 1874, the President nominated Hezekiah G. Wells, of Michigan, as presiding judge, and Martin H. Ryerson, of New Jersey; Kenneth Rayner, of Mississippi; William A. Porter, of Pennsylvania, and Caleb Baldwin, of Iowa, as judges. These nominations were duly confirmed by the Senate. In the winter of 1874-75 Judge Ryerson resigned and soon afterward died. He was succeeded by Harvey Jewell, of Massachusetts, who was appointed February 26, 1875. Judge Baldwin died on the 15th of December 1876, but the vacancy created by his death was not filled.

June 24, 1874, the President appointed John Davis, of Massachusetts, as clerk of the court, and the nomination was confirmed by the Senate.

As counsel for the United States, the President, on the 22d of July 1874 designated John A. J. Creswell, of Maryland, formerly Postmaster-General of the United States.

Alexander Sharp, marshal of the United States for the District of Columbia, discharged the duties of marshal of the court.

R. W. C. Mitchell acted as shorthand reporter of the court from the time of its organization till its termination.

In accordance with the provisions of the act of Congress, the judges met and organized the court at Washington on the 22d day of July 1874, and as there was no suitable place in the government buildings they held their sessions at

1514 H street NW. On the 24th of July they adopted rules and regulations, which, together with the notice of their next session, were duly published. The court then adjourned to Thursday the 1st of October, in order that claimants might file their memorials and prepare for trial. The rules adopted by the court were as follows:

"RULES OF THE COURT OF COMMISSIONERS OF 'ALABAMA' CLAIMS.

"I. The clerk of the court is directed to file of record all claims which may be transmitted to him, and to enter the same on the docket in the order of time in which they may be received.

"Claims transmitted by mail may be addressed to 'John Davis, esq., clerk of the Court of Commissioners of *Alabama* Claims, Washington, D. C.'

"II. All claims must be verified by the affidavit of the claimant, and filed in this court within six months from the 22d day of July 1874.

"III. Every claim shall be stated in a petition addressed to the court, and signed by the claimant or his attorney.

"The petition shall set forth—

"1st. The title of the case, with the full Christian names and surnames of all the claimants, the places and times of their birth, and the places of their residence between the 13th day of April 1861 and the 9th day of April 1865, both inclusive.

"If any of the claimants be naturalized citizens, an authenticated certificate of their naturalization shall be appended to the petition, and the petition shall also state whether the claimants, or any of them, have been naturalized in any other country than the United States; and if not so naturalized, whether any and what steps have been taken toward being so naturalized.

"2d. A plain and concise statement of the facts and circumstances, giving place and date, free from argument, and stating all assignments and transfers, whether in whole or in part.

"3d. The prayer, in which the claimant shall state distinctly the amount of the actual loss or damage for which he asks judgment, and the date from which he claims interest thereon.

"The claimant shall also give the post-office address of himself and of his attorney; and may append to his petition, as exhibits, the instruments or documents to which it refers, but shall not insert the same in the body of the petition. Immediately upon the filing of any petition, fifty copies of the same and the accompanying documents shall be printed in octavo form, under the direction of the clerk, for the use of the court and counsel.

"IV. Parties having a common interest, growing out of the destruction of the same vessel or its cargo, may unite in one petition for the recovery of their respective claims, which may be heard together, but separate judgments shall be rendered in the case of each claimant.

"V. Any person of good moral character admitted to practice as attorney or counsel in the supreme court of any State or Territory or the District of Columbia, or in any of the Federal courts, on filing with the clerk a written statement of the date and place of such admission, with his name and post-office address in full, may, on motion, be admitted to practice in this court.

"VI. It shall not be necessary for the United States to deny, specially, in writing, the validity of any claim; but a general denial of every claim shall be entered of record by the clerk as of course, and thereby every material allegation shall be considered as put in issue by the United States.

"Objections as to the law of the case may be raised by the United States at any stage of the proceedings by demurrer, stating the grounds of such objections with reasonable certainty.

"VII. Testimony to be used in this court may be taken before a commissioner empowered by any circuit or district court of the United States to take testimony, on a rule entered of record in this court for that purpose by either party in any pending case, provided twenty days' notice be

given to the adverse party; but nothing herein contained shall prevent the taking of testimony before any other person, with the leave of this court, nor prevent counsel from accepting, by agreement in writing, a shorter notice than twenty days.

"VIII. It shall be the duty of the counsel of the claimant, at least ten days before the day of hearing, to file with the clerk of the court fifty copies of a brief (printed in octavo form) of the argument in behalf of the claimant.

"IX. Claims supported by printed or written testimony shall be first heard in the order in which they stand on the docket, unless otherwise specifically ordered by the court; and afterward those claims shall be heard in support of which the claimant may desire to introduce oral testimony.

"X. In cases where the amount claimed exceeds the sum of one thousand dollars, the claimant shall be at the expense of printing his own brief and testimony. In cases not exceeding that amount the printing shall be done, under the direction of the clerk of the court, at the expense of the United States.

"XI. The time to be occupied in the oral arguments of counsel shall be regulated by the rule in force in the Supreme Court of the United States.

"XII. Whenever any deposition or document shall have been filed in any case before this court, either party to any other case may use such testimony on the hearing thereof: *Provided*, That the party so desiring to use such testimony in a case in which the same was not originally taken shall file a notice in the case in which such testimony is sought to be used five days before the hearing thereof of his intention so to do, specifying therein particularly the depositions or documents sought to be used and the case or cases in which the same were originally taken."

When the judges reconvened they found that, contrary to their expectations, very few cases were ready for trial, or had even been filed. Indeed, only 3 petitions were filed in July, 5 in August, and 64 in September, making in all only 72 when the court reassembled. It was not until October that the number largely increased, and 312 more petitions were filed in January 1875 alone than in the previous five months together. By the 22d of January, on which day the period for the presentation of petitions terminated, 1,382 claims had been filed, and of these 767 were filed during that month. The court remained very constantly in session during the winter of 1874-75, considering amendments to the rules, hearing extended arguments on points of law arising on demurrers, and deciding all claims presented for final hearing. In the preparation of cases however there was great delay, and in order to hasten the dispatch of business the court on the 26th of January 1875 passed an order by which it was directed that the clerk should enter on the trial docket, in their numerical order, all claims in which no decision had been rendered; that this docket should be called three times, but that a greater number than 50 cases should not be called in one day; that at each calling of the docket parties who had not previously been heard would have an opportunity to submit their proofs and arguments; and that on the third calling of the docket every claim should be disposed of by final judgment. On the first calling of the docket it was found that comparatively few claims were ready for final hearing, and the court, after deciding every case that was ready, adjourned until the 28th of April 1875, at the same time publishing an order to the effect that the second calling of the trial docket would be commenced on its reassembling, and that no case would then be passed without the assignment of a sufficient reason for so doing.



Rules for Taking  
Testimony.

During the preceding session the court adopted rules to govern the taking of testimony. These rules, with certain explanations which it was afterward found necessary to make, were as follows:

"COURT OF COMMISSIONERS OF 'ALABAMA' CLAIMS,  
Washington, D. C., ———, 1875.

"SIR: I inclose herewith interrogatories and cross-interrogatories to be used in the examination of ———, of ———, in the claim of ——— against the United States, No. ———.

"In the examination of this witness, you will be pleased to conform to the following rules.

I am, sir, your obedient servant,

\_\_\_\_\_,  
"Clerk.

"To ———, esq.,  
"Commissioner, &c.

"RULES.

"1. You will require the witness to hold up his right hand, and make solemn oath [or if he have conscientious scruples against taking an oath, to affirm] to 'tell the truth, the whole truth, and nothing but the truth relative to the matters now to be inquired of.'

"2. You will allow no person to be present except the witness, unless it be needful for you to employ a third person to write down for you the witness's answers.

"3. You will put each interrogatory, and write down in full the answer thereto, before proceeding to the next succeeding interrogatory. Endeavor to reduce to writing, so far as possible, the exact words of the witness. Should any alteration be necessary, note it over your initials, without making erasure or interlineation.

"4. After the witness has fully answered all the interrogatories, and you have reduced his answers to writing, you will read over to him each question and his answer thereto, and permit him to make at the end of his deposition such correction as he may desire, and give reason for. He will then sign his deposition, as will you, with your full name and title.

"5. You will begin the deposition as directed in the accompanying form A.

"6. You will add to the deposition a certificate, as per accompanying form B.

"7. Should it be necessary to adjourn the hearing, you will make a note of it in the deposition.

"8. The sheets should be carefully connected, and the interrogatories which you receive with the deposition should be mailed to my address.

"9. You will also sign your name at the bottom of each page of the deposition.

"FORM A.

"The deposition of ———, taken in the case of ———, claimant, *vs.* The United States, No. ———, upon written interrogatories filed by the claimant, and cross-interrogatories filed by the United States, at ———, before me, ———, a duly appointed commissioner, on the ——— day of ———, 1875, to be used in the Court of Commissioners of Alabama Claims.

"FORM B.

\_\_\_\_\_, \_\_\_\_\_, 187-.

"I, ———, a commissioner duly appointed by the Court of Commissioners of Alabama Claims to take the testimony of ———, to be used in the case of ——— *vs.* The United States, before the said court, do hereby certify that on the ——— day of ———, 187-, I caused the said ——— to appear before me at the said ———, and permitted

no other person than himself to be present except \_\_\_\_\_ before me; that I administered an oath to said \_\_\_\_\_, that he would tell the truth, the whole truth, and nothing but the truth relative to the matters to be inquired of; that his deposition was then reduced to writing by me, [by a clerk appointed by me for that purpose,] and no interrogatory was put to the witness until the previous interrogatory had been answered by him; that the whole deposition was carefully read by him, and that he subscribed the same.

"And I do further certify that I have no interest whatever in any of the claims referred to in this deposition.

"In testimony whereof, I have hereunto set my hand and seal this \_\_\_\_\_ day of \_\_\_\_\_, 187—.

[SEAL.] \_\_\_\_\_.

"COURT OF COMMISSIONERS OF 'ALABAMA' CLAIMS,

"1514 H street N. W., Washington, D. C., \_\_\_\_\_, 187—.

"\_\_\_\_\_,"

"\_\_\_\_\_."

"SIR: Owing to a very general misunderstanding as to the manner of taking testimony to be used before this court, I would call your attention to the annexed rules, which must be observed in every case except where a special order of the court is obtained to the contrary. No testimony will be placed on file until all the requirements of these rules shall have been complied with.

"I am, sir, your obedient servant,

"JOHN DAVIS, Clerk.

#### "RULES.

"1. No commissioner shall take testimony except after receipt of a certificate of record of a rule for that purpose, as per inclosed blank.

"2. The certificate must be filled out on the face, and signed by the clerk of the Court of Commissioners of *Alabama* Claims, and must have the seal of said court attached.

"3. The certificate must show on the back a notice to the counsel on behalf of the United States for the *full twenty days* required by Rule VII. of the Court of Commissioners of *Alabama* Claims.

"4. The certificate must show on the back also the acceptance of said notice by said counsel on behalf of the United States.

"5. When testimony is taken in the same case before different commissioners, a certificate must be filed with each commissioner.

"6. When the testimony in any case has been filed with the clerk of this court, further testimony may be taken in the same case before the same commissioner without another certificate; *provided* a written agreement to that effect is filed with the said commissioner, signed by the assistant counsel of the United States present when the testimony was first taken, and the counsel for the claimant.

"7. After the certificate shall have been obtained, and the counsel on behalf of the United States shall have received and accepted notice for the *full twenty days*, special agreements in writing may be made by the assistant counsel of the United States in charge of any case, and the counsel of the claimant, changing the date of taking testimony.

"8. The certificate of record and all written agreements of counsel must be forwarded to the clerk of the Court of Commissioners of *Alabama* Claims with the testimony."

When the court reassembled on the 28th of April, it  
**Extension of Time.** was found that a considerable number of cases were ready for trial. Less than three months now remained of the year within which the business was to be completed. To dispose of all the cases within that time was obviously impossible. The President therefore on the 2d of June 1875 issued, in accordance with act of Congress,

a proclamation extending the duration of the court for a period of six months after the 22d of July, the day on which the first year after its organization expired. Between the 28th of April and the end of October 1875, 643 cases were argued and submitted. Of these, 140 were dismissed for want of jurisdiction, while a large proportion of those allowed were small in amount and presented few points for discussion; but of the cases that remained to be submitted, some involved large sums and required a more extended examination and a more thorough argument than could be made within the less than two months remaining of the court's existence.

The causes of the delay in the business of the court were various. Apart from the fact that the court organized in the summer, when the transaction of legal business is likely to be somewhat intermittent, many of the claims were for losses sustained by mariners who, when the time came to prepare their cases, were at sea, while other claims were dependent upon the testimony of seafaring men whom it was difficult to reach. Commissions for the taking of testimony were sent out to all parts of the world, and it is stated that in some cases the commission followed the witness from port to port, during a long voyage, reaching him at last thousands of miles from the place to which it was first forwarded. Many claimants had died, and their papers were lost or left in disorder. In some cases the claimants, or important witnesses, were absent on whaling or other long voyages. Moreover, the claims were for the most part in the hands of comparatively few attorneys, who, during the period prescribed for the presentation of claims, were constantly occupied in drawing and filing petitions, and had had no opportunity to prepare their cases for trial.

On the 1st of November 1875 Mr. Davis, by direction of the court, informed the Secretary of State of the condition of its business. Of the 1,382 cases filed, 688 had been argued and submitted. Of the latter, 147 had been dismissed, judgment being entered for the United States; and 535 judgments had been rendered for the claimants. In all, 682 judgments had been entered. There thus remained 700 cases yet to be disposed of, and of these only 12 were ready for trial.<sup>1</sup> In view of these facts President Grant, in his annual message to Congress of December 7, 1875, recommended that legislation be adopted to enable the court to complete the work before it. In accordance with this recommendation Congress, by an act approved December 24, 1875,<sup>2</sup> extended the existence of the court to the 22d of the following July; and the powers of the clerk were extended for an additional period, not to exceed two months from the termination of the existence of the court, for the purpose of enabling him to close his accounts and deposit the records of the tribunal in the office of the Secretary of State.<sup>3</sup> By another act, approved March 6, 1876,<sup>4</sup> it was made the duty of the court to receive and decide all claims which might be filed within three months after the act took effect, provided it should satisfactorily appear that the claim had not been filed within the time previously limited by reason of the claimant's absence from the United

<sup>1</sup> For. Rel. 1875, I. XXXI.

<sup>2</sup> 19 Stats. at L. 1.

<sup>3</sup> Davis's Report, S. Ex. Doc. 21, 44 Cong. 2 sess. 138.

<sup>4</sup> 19 Stats. at L. 6.

States, or his ignorance of the time prescribed for the filing of petitions, or by reason of fraud, accident, or mistake.<sup>1</sup> It was chiefly for the purpose of examining and deciding the claims filed under this provision that Congress, by an act approved July 22, 1876,<sup>2</sup> extended the existence of the court again till the 1st of the following January, the powers of the clerk being also extended for an additional period, not to exceed two months after that date.

The court adjourned on the 29th of December 1876

**Summary of the Court's Work.** having disposed of all the business before it. The gross amount of the 1,383 claims filed in the six months ending on the 22d of January 1875 was \$12,673,451.44, exclusive of interest. This sum however did not include several claims in which it was simply stated that certain property was destroyed, no estimate of its value being offered. In the three months allowed by the act of March 6, 1876, for the filing of additional petitions, 685 claims were received, amounting to \$1,825,865.55. Altogether the court disposed of 2,068 claims, aggregating \$14,499,316.99, exclusive of interest. The total amount of the judgments was \$9,316,120.25, including interest. Nearly all the claims were for the loss of property destroyed by one of the cruisers named in the act, or for the loss of mariners' wages and personal effects occasioned by the destruction of the vessel on which such mariners were serving, or, in the case of whalers, for the loss of catch and of shares of the "lay."<sup>3</sup>

The necessity of disposing of a large number of claims

**Services of Counsel.** in a short time threw upon the counsel for the United States, who was required to represent the government in each case, an onerous duty. For a time he was by direction of the court assisted in the trial of causes by a member of the bar whom he selected with the court's approval.<sup>4</sup> Assistant counsel were also employed in many cities of the country for the purpose of examining and cross-examining witnesses whose testimony had to be taken there.

In some cases oral testimony was given before the

**Testimony.** court. Apart from these cases testimony was generally taken before commissioners appointed by the court, preference being given in the making of such appointments to commissioners of the circuit courts of the United States, and in foreign countries to secretaries of legation and consular officers of the United States.

<sup>1</sup> On March 7, 1876, the day after this act was approved, the court adopted the following special rule: "In case of any claimant who may desire to present a claim under the provisions of an act \* \* \* approved March 6, 1876, and who may be absent from the United States at the time of the making or of presenting his petition, such petition may be presented and verified by the attorney in fact of such claimant, or by any agent specially authorized thereto, or by any person acting as agent or next friend; but in every case of a petition filed without precedent authority specifically given, the court will require subsequent ratification of such petition or claim by the claimant. Such agency or ratification shall, in every case, be duly established by proof to the satisfaction of the court."

<sup>2</sup> 19 Stats. at L. 96.

<sup>3</sup> Hackett's Geneva Award Acts, 11.

<sup>4</sup> Id., 15.

Testimony was taken on notice, and either on written interrogatories or on oral examination by attending counsel, in almost every State or Territory in the Union, and in Great Britain, France, Germany, Japan, China, India, Peru, the West Indies, the Hawaiian Islands, and other foreign countries.<sup>1</sup>

The usual mode of trial was necessarily simple. The claimant filed a petition setting forth his demand, and the United States joined issue by the clerk's entering on the record a general denial. Printed briefs were submitted, wherever necessary. The judges on important questions delivered written opinions.

For the purpose of estimating the value of ships and the "Trinity Masters," materials used in navigation, the services of three experienced officers of the revenue marine, Captains McGowan, Ottinger, and Henriques, were secured. These officers came familiarly to be known as the "Trinity Masters;" and their expert testimony, given orally at the trial, on behalf of the government, proved to be of great assistance.<sup>2</sup>

The clerk of the court, Mr. Davis, who performed the duties of his office in such a manner as to secure the commendation of the judges and of the Secretary of State, prepared for the convenience of the court and bar a printed docket and issued the opinions of the judges in printed form immediately on their delivery.<sup>3</sup> At the conclusion of his labors, besides settling the accounts of the court and placing its records in the Department of State, he presented to the Secretary of State a report which contains, in addition to a general statement of the business and powers of the court, remarks on the principal points decided and the text of the more important opinions delivered by the court.<sup>4</sup>

The opinions of the court, together with the dissenting opinions, were collected and bound in two small volumes, which form part of the printed records. In these volumes the paging is not continuous.

By the act of June 23, 1874, the judges constituted a "court;" but it does not follow that they possessed, in general, judicial powers not expressly conferred by the statute. In one case Porter, J., delivering the opinion of the court, said: "The act of Congress has conferred on this court almost unprecedented powers, by making us judges both of the law and the facts of every case, and giving no appeal from our judgments to any other tribunal; but the court is nevertheless one, not of general, but of special and limited jurisdiction, and clearly no claimant can bring himself within

<sup>1</sup> Davis's Report, 11.

<sup>2</sup> Hackett's Geneva Award Acts, 11.

<sup>3</sup> Hackett's Geneva Award Acts, 20; S. Ex. Doc. 21, 44 Cong. 2 sess. 154-155.

<sup>4</sup> S. Ex. Doc. 21, 44 Cong. 2 sess. In this report Mr. Davis adverted to the services of Mr. Creswell, and called attention to the assistance rendered, in the transaction of the business of the court, by Messrs. J. Scott Laugh-ton, J. C. Poor, Thornton Carusi, Arthur O'Connor and R. W. C. Mitchell, the shorthand reporter.

this jurisdiction without an exact and faithful compliance with the terms of the act."<sup>1</sup>

In another case the court, holding that it had power to permit the amendment of claims, expressed the opinion that it possessed the same power in respect to the amendment of pleadings as "belonged generally to other courts;" but it based its decision principally on the provision of the act of 1874, which expressly conferred on it the power to make rules for the government of its procedure.<sup>2</sup>

In yet another case the court held that it had no power to decide conflicting questions of title between claimants, or to compel claimants to interplead. Its powers were, said the court, "identical with those given to the commissioners under the Spanish treaty," as determined by the Supreme Court of the United States in the case of *Comegys v. Vasse*, 1 Peters, 193, in which it was held that those commissioners had power to decide upon the amount and validity of claims against the United States, but not upon the conflicting rights of parties to the sums awarded by them.<sup>3</sup>

In one case in which certain claims of counsel were not allowed, counsel requested the court, which had delivered no opinion, to state its rulings on the points of law involved, contending that it was a court of the United States and that an appeal from its rulings would lie to the Supreme Court of the United States. The motion was not allowed.<sup>4</sup>

Where a claimant failed to aver in his petition that Claimants—Who Were: he "did at all times during the late rebellion bear true allegiance to the United States," so as to bring himself within the terms of the twelfth section of the act of 1874, Porter, J., delivering the opinion of the court, after observing that how the amount of the award at Geneva was made up was not known, and that the act of Congress must be the chief guide in the actual work of distribution, said: "It is clear to us that the government had the right to prescribe the terms on which claimants should present their claims. They were not strong enough to compel payment of the money by Great Britain, and when this government obtained it the claimants had no power to demand it, and no legal right to it except that which the government by its own acts chose to accord. They must, therefore, take their respective shares of it subject to all the conditions which the government has thought it fit to appoint, or not take them at all."<sup>5</sup> The court, however, looked to the correspondence in relation to the *Alabama* claims, and to the proceedings before the Geneva tribunal, in order to determine what was meant in the act of Congress by "all claims admissible under this act \* \* \* directly resulting from damage caused by the so-called insurgent cruisers," etc. And on the ground, among others, that claims for personal injuries were not put forward by the United States either in the diplomatic correspondence or

<sup>1</sup> *Williams v. United States*, No. 45, Davis's Report, 30, 32.

<sup>2</sup> Davis's Report, 125.

<sup>3</sup> Davis's Report, 112. This ruling was followed by the second Court of Commissioners of *Alabama* Claims, in the case of *Small v. United States*, No. 1942, class 1. See also *Butler v. Goreley*, 146 U. S. 303.

<sup>4</sup> Davis's Report, 23.

<sup>5</sup> *Williams v. United States*, No. 45, Davis's Report, 31.

before the Geneva tribunal, the court held that it was not the intention of Congress that such claims should be allowed, such an intention not having been clearly expressed.<sup>1</sup> In another case the court, in considering whether a British subject could assert a claim upon the fund, said: "Whilst, as before said, these preliminary discussions and negotiations are of no binding authority upon this court, yet does not national courtesy and good faith require of us to suppose that Congress in creating this court never intended we should distribute this fund other than for the purposes for which Great Britain supposed she was paying it? \* \* \* If Great Britain supposed, as seems to have been the case, that in paying this money it was to indemnify those who had been injured by her failure to execute her own municipal laws, would she not regard any action on our part in indemnifying her own subjects for her neglect as inconsistent with the objects and purposes for which she agreed to the arbitration in the first place, and to the payment of the money in the second place?"<sup>2</sup> All claims, of which there were several, for loss of property destroyed by cruisers other than the *Alabama* and the *Florida* and their tenders, and the *Stenandock* after she left Melbourne, were dismissed for want of jurisdiction.<sup>3</sup>

Only one claim was filed for national losses. This

**National Losses.**

was a claim presented by the Secretary of the Navy for the loss of the *Hatteras*, a vessel of war, sunk by the *Alabama*, and for the loss of the *Greenland*, a vessel chartered by the Navy Department as a transport and destroyed by the *Florida*. Several claims were filed by the officers of the *Hatteras* under the act of June 23, 1874, for the loss of property destroyed when the vessel was sunk, and these claims, which were afterward allowed, were pending when the act of March 6, 1876, was passed, permitting the presentation of further claims. It was under the latter act that the claim in question was filed by the Secretary of the Navy, and when the case was reached the solicitor of the Navy Department and the counsel for the United States submitted the whole matter to the consideration of the court. The court, through Jewell, J., after stating that the presentation of the claims of the officers of the *Hatteras* might have led the Secretary of the Navy to think it his duty in his official capacity to present the petition, lest he might at some time be thought to have been remiss in the care of his special department and be called to account therefor, expressed a clear opinion that Congress did not intend that the court should consider any claims for property of the United States destroyed by any of the Confederate cruisers. The court said:

"It is well known that all claims for compensation for the loss of public property of the United States were either abandoned voluntarily by the counsel of the United States before the arbitrators at Geneva or were absolutely rejected by the tribunal itself, and the only damages awarded were for the value of private vessels and property destroyed. The fund out of which our judgments are paid represents the estimated value of private

<sup>1</sup> *Williams v. United States*, No. 87, Davis Report, 26.

<sup>2</sup> Davis's Report, 35, 41.

<sup>3</sup> Davis's Report, 22.

<sup>4</sup> *Geo. M. Robeson, Secretary of the Navy v. United States*, No. 2066, Davis's Report, 120.

property alone, and does not include anything based upon the value of public property destroyed.

"The reclamation made upon Great Britain was made by our Government in its capacity of sovereign, and not as a mere representative of private interests, and the indemnity received has been paid to the United States as a government. The fund is now in the Treasury, entirely under the control of Congress, invested as directed by Congress, and was so when the act constituting this court was passed. Congress might have refused to pass any act providing for the indemnification of citizens; it might have retained the whole fund; it did appropriate such part of the fund as it judged just and right to be distributed among certain classes of claimants therefor. After the payment of the amount of our judgments, as provided by law, it may still retain the balance remaining, or it may provide for a further distribution among other classes of claimants. But in so doing it will dispose of its own; of money held in the Treasury of the government, free from all restraints except those which ought to influence any sovereign power under the circumstances. No judgment of this court can change the character of this fund, or any part of it, so as to make it in any higher sense the property of the government than it now is.

"If our judgment in this respect would have any effect it would be to lessen the right or power of the government over the unused balance. The Navy Department is a part of the government itself, and any award we should make to it would be to the government, and the effect of such award would rather be to lead to the conclusion that the remainder of the fund not needed to satisfy our judgments was not in a just and true sense the property of the United States, over which Congress had supreme power and control. If our judgment is needed to confer upon the United States any title to a part of this fund, it would follow that the government has not a complete title to the remainder.

"We are satisfied that Congress did not intend to give us the power to adjudicate upon the rights of the government in regard to this fund."

Claims for injuries to the person were rejected. Such *Injuries to the Person.* claims were not preferred by the United States, either in the diplomatic correspondence or in the proceedings at Geneva, and the court held that it was the intention of Congress to limit its jurisdiction to claims for the loss of property only.<sup>1</sup> In several cases where claimants asked indemnity for injury to health, occasioned by the exposure, fright, and suffering consequent upon capture, or harsh treatment after capture, while on one of the so-called insurgent cruisers, demurrers were filed and sustained.<sup>2</sup>

*Claims of Insurers.* Six claims of insurers, corporate or individual, were allowed, aggregating \$111,055.23, exclusive of interest.

In all these cases the claimants alleged and proved that their losses in the business growing out of war risks were greater than their premiums and other gains growing out of such risks. In one case in which no allegation to that effect was made, the petition was dismissed.<sup>2</sup>

Meaning of "True Allegiance." It has been seen that by section 12 of the act of 1874 it was provided that no claim should be allowed "arising in favor of any person who did not at all times during the late rebellion bear true allegiance to the United States." The claimant in a certain case alleged "that he was not at the times mentioned in the petition herein, nor at any other time or times, actively or otherwise, or in any way, engaged in making or carrying on war against the United

<sup>1</sup> *Williams v. United States*, No. 87, Davis's Report, 26.

<sup>2</sup> Davis's Report, 22.



States, or in aiding or abetting \* \* \* the so-called Southern Confederacy, or any person or persons engaged in rebellion or making or carrying on war against the United States." The court held that this averment, which in substance stated that the claimant was not guilty of treason, as defined by the Constitution of the United States, was insufficient.<sup>1</sup> And in another case it was held to be insufficient to aver merely that for any offenses committed by the claimant during the rebellion he had received a pardon from the President of the United States.<sup>2</sup>

By the 12th section of the act of 1874 it has been seen Who Were Entitled to that no claim was allowable, "arising in favor of any Protection. person not entitled, at the time of his loss, to the protection of the United States in the premises." The court held that this did not exclude men enlisted at the time when their claims arose in the commercial marine, or whale fishery, under the flag of the United States, such persons being entitled to the "protection of the United States," though they were unnaturalized foreigners. The court held however that this rule did not apply to British subjects, whom it could not be supposed that the award was intended to indemnify.<sup>3</sup> But it was held to apply to a German subject who had obtained in British India a qualified naturalization, not entitling him to all the privileges of a British-born subject.<sup>4</sup> Claims of the republic of Peru, presented by its agent, for indemnity for the loss of guano in American vessels destroyed by Confederate cruisers, were dismissed.<sup>5</sup> A claim for the destruction of a whaling vessel sailing at the time under the Hawaiian flag was also disallowed, together with the claims for loss by seamen on the vessel.<sup>6</sup> But in a case in which there was a simulated transfer of a ship by American owners to a British subject, and the British flag was hoisted merely for the purpose of misleading and escaping a Confederate cruiser and preventing a capture, it was held that the American owners, the ship having been destroyed by a Confederate cruiser, were "entitled to the protection of the United States in the premises," and to the relief which the court was authorized to afford.<sup>7</sup>

The act of Congress directed the court to examine Losses "Directly Resulting." claims "directly resulting" from the acts of the particular cruisers mentioned. It was held that this category did not embrace a claim for loss of catch in consequence of being chased and driven away from the scene of whaling operations;<sup>8</sup> nor for the cost of an average adjustment on a ransom bond taken from the master of a vessel that was captured, but not destroyed;<sup>9</sup> nor for the compensation of a vessel, which was itself never captured, for taking the crews of vessels destroyed by one of the cruisers from a vessel that had been

<sup>1</sup> *Williams v. United States*, No. 45, Davis's Report, 30.

<sup>2</sup> *Rhind v. United States*, No. 242.

<sup>3</sup> *Worth v. United States*, No. 91, and other cases, Davis's Report, 35.

<sup>4</sup> *Schreiber v. United States*, No. 740, Davis's Report, 105.

<sup>5</sup> Davis's Report, 25.

<sup>6</sup> *The Harvest, Eldridge v. United States*, No. 1254, Davis's Report, 25.

<sup>7</sup> *Pike v. United States*, No. 736.

<sup>8</sup> *Garnett v. United States*, No. 184, Davis's Report, 42.

<sup>9</sup> *Hyneman v. United States*, No. 643, Davis's Report, 45.

captured and bonded, and carrying them to a place of safety.<sup>1</sup> On the same ground, apparently, the court rejected claims for the amount of moneys paid to insurance companies for insurance of property against destruction by cruisers, the property insured not having been destroyed.<sup>2</sup>

Two persons named Osgood and Stetson claimed the value of merchandise owned by Dimon Hubbard and destroyed by the Confederate cruisers. The claim was made under an assignment to complainants from Hubbard, made and filed in the Department of State, before the organization of the court. Hubbard also filed a petition claiming indemnity for the same losses and moved that the claims be heard and decided together. This motion was denied and Hubbard's petition dismissed. In this case and in Taylor and MacLeane's cases, the court seems in substance to have held, (1) that the assignment vested the legal title in the claim in the assignee; (2) that its judgment should be for the party holding the legal title; (3) that it could not adjudicate the rights of parties setting up equities in respect of the claim.<sup>3</sup>

We have seen that by the act of June 23, 1874, the court was directed at the time of giving judgment to allow, on motion of the attorney or counsel for the claimant, out of the amount awarded, such counsel and attorney's fees as it might deem just and reasonable, the allowance so made to be entered as part of the judgment and to be made specifically payable "to the attorney or counsel, or both." Under this provision motions were made in several cases, which have been stated as follows:

"In one instance the motion was made after entry of judgment, but before it had been reported to the Secretary of State. Counsel who made the motion argued that under the words of the statute, viz, 'at the time of the giving the judgment,' his right to judgment for his fees was not excluded, because, in accordance with a well-known rule of practice, the judgment was under the control of the court during the term of the court at which it was rendered, and the term of the court in this case continued until the judgment had been certified to the Secretary of State. The motion was allowed.

"In another case counsel moved for an allowance before entry of judgment for an amount agreed upon between the complainants and himself. The motion was denied, the court stating that this section of the act seems to refer to cases of disagreement between counsel and claimants, in which injustice is likely to be done to counsel, when the court is authorized to examine the circumstances of his employment and the services rendered, and to fix such an amount as the court shall determine to be just and reasonable. That the fact that an attorney may be put to delay in receiving his money can not be considered by the court, and no relief can be given counsel on that account.

"Again counsel moved for an allowance under this section, stating that he had been employed by the attorney for the claimant to argue the cause and had prepared the argument, when other counsel were retained in his stead. The court refused an allowance, not doubting that the counsel had rendered important services in the preparation of the case, but holding that they 'under that section have the power to allow compensation only to the counsel or attorney who has actually appeared before the court and rendered services in the case in court, or, at least, who has been authorized by a claimant to appear as his counsel or attorney on the records of the court.'"<sup>4</sup>

<sup>1</sup> *Phillips v. United States*, No. 1228, Davis's Report, 56.

<sup>2</sup> Davis's Report, 22.

<sup>3</sup> Id., 24, 112.

<sup>4</sup> Id., 25.

By the act of June 23, 1874, all claims were, as we have seen, required to be "filed in said court [of Commissioners of *Alabama Claims*] within six months after the organization thereof." In the case of William C. Geohagan the petition was not received till the six months had elapsed, but it appeared that it would have reached the court in time but for an accident to the postal service. On these facts the court ordered that the claim "be filed *nunc pro tunc* as of the day when it would have reached the court in due course of mail, viz, on the 16th of January, the court being satisfied by the inspection of the papers, including the postmark, that the petition failed to reach the office of the court merely through an accident.<sup>1</sup>

In several cases in which motions were made for a rehearing the court followed the rule laid down by the Supreme Court of the United States in the case of *Brown v. Aspdon*,<sup>2</sup> and reaffirmed in *Public Schools v. Walker*,<sup>3</sup> "that no reargument will be heard in any case after judgment is entered, unless some member of the court who concurred in the judgment afterward doubts the correctness of his opinion and desires a further argument on the subject." In applying this rule the court held, in accordance with the practice of the Supreme Court, that when the court did not of its own motion order a rehearing, it would be proper for counsel to submit without argument a written or printed brief, petition, or suggestion of the point or points deemed important, and that if, upon such petition or suggestion, any judge who concurred in the decision should think proper to move for a rehearing, the motion would be considered. It was also decided in several cases, after judgment and receipt of the money by the claimant, that a rehearing would not be granted.<sup>4</sup>

In a case in which the claimant moved for leave to amend his petition, after the time of filing claims had expired, by substituting for his prayer for an allowance of "fifteen thousand dollars," which would have been construed as meaning paper currency, a prayer for the allowance of that sum in gold, the court, two judges dissenting, held that it had power to permit amendments, and granted the motion. In this relation the court said:

"To what extent we shall exercise the power thus committed to us will depend upon the merits of each application. Merely formal changes ought to be allowed on motion, as of course. Amendments which touch the substance of the claim will also be allowed where we are satisfied that the original petition was filed in good faith; where the averment sought to be corrected originated in some error or want of information on the part of the claimant or his counsel; where the motion to amend is made within a reasonable time, and where the government has not in the meanwhile been misled in some material point in the preparation of its proofs.<sup>5</sup>

<sup>1</sup> Davis's Report, 12.

<sup>2</sup> 14 How. 26, 27.

<sup>3</sup> 9 Wall. 603.

<sup>4</sup> Davis's Report, 25.

<sup>5</sup> Davis's Report, 126. In this report it is stated that "generally amendments were allowed after the time for filing petitions had elapsed, where they did not have the effect of making a new claim or enlarging the old one. Before the time for filing petitions had elapsed all amendments were allowed." Id. 25.

"In no case was the court called upon to punish for contempt or perjury, nor was any process issued to enforce the production of books and papers."

By section 11 of the act of June 23, 1874,<sup>1</sup> all claims  
Verification of Claims. were required to be "verified by oath of the claimant;"  
and by Rule III. of the court every claim was required to be stated in a petition. Counsel requested the court to place a construction upon this section of the act, when Wells, presiding judge, read the following memorandum:

"The court has been asked by counsel to place a construction upon the second sentence embraced in section 11 of the act of Congress approved June 23, 1874, and under which the 'Court of Commissioners of *Alabama Claims*' was created, and thus determine in advance, and before the question is raised in any given case, whether two or more claimants in the same petition may not have their respective claims verified by any one of such claimants named in said petition. Ordinarily it would be impolitic, if not improper, thus to give an opinion in advance and before such question was raised in the trial of a given case; but in this instance, as many of the cases already on the calendar have several claimants, it may not be amiss at once to dispose of the question for the purpose of facilitating the business of this court. It may be argued in favor of permitting one of several claimants to make the oath in behalf of himself and one or more others in any given case, that the object of the verification by oath is merely to get such case before the court, so that proofs and adjudication may be had; that, in fact, the oath of the claimant does not in any case constitute absolute evidence; that the formality of the law in this requirement is, in fact, complied with by the affidavit of one, although the interests of several were involved.

"Some degree of latitude might be tolerated if the court was called upon to construe one of its own rules, to which it would undoubtedly have the right to make exceptions; but in this case it is a provision of the law itself, and whether a necessary provision or not is not the province of this court to determine. It may be that Congress intended that each claimant, although joining with others in the same case, should make separate verifications under oath of his particular interest and its value, possibly conceiving that estimates of value might be different as presented by the different claimants, and that no one claimant, although presenting his claim jointly with others, could properly make affidavit other than as to his belief in reference to the loyalty of his associate claimant; but this court is impressed with the belief that it is not its province to determine the reasons that induced any particular action on the part of Congress. We find the law plain in its provision 'that all claims shall be verified by oath of the claimant;' and we understand that in the use of the word 'claimant' the law refers specifically to *each claimant*, and that each claimant when associated or joined with others in any given case must verify by his own oath his claim."

The following cases are referred to by the clerk of the court in his final report:

"In *Matthew A. Chadwick v. The United States*, the petition was filed and verified by Elizabeth L. Chadwick, the wife and attorney of Matthew A. Chadwick, it being averred that the claimant was absent at sea, and was not expected home until November 1875, too late to file a petition.

"Petition demurred to, 'because the claim of the said complainant is not duly verified by the oath of the claimant.'"

"Demurrer overruled, 'the court holding that where a party claimant is beyond the limits of the United States, and it is impossible at the time of making the petition to procure his oath, the oath of his authorized attorney is sufficient to make his petition admissible, provided the facts

<sup>1</sup> Davis's Report. 25.

<sup>2</sup> 18 Stats. at L. 245.

of such absence and inability to procure such oath are set out in the petition, or in an annexed affidavit.

"*Miguel Ignacio v. The United States* was a claim for personal effects and wages, brought by William Gordon, jr., as attorney and next friend of the complainant. It did not appear at first whether Ignacio was alive when the claim was filed; subsequently, and after the time allowed for filing petitions had expired, his death was suggested and a motion made to substitute an administrator as complainant. At the trial of the case it appeared that Ignacio had died at a date prior to that on which the petition was filed. The petition was dismissed; no opinion was delivered; but the court apparently sustained the position of the counsel on behalf of the United States that the claim being filed by a person having no standing in court (the next friend of a deceased person having no authority to act) can not be amended by bringing in a new party-claimant after the time for filing claims has expired.

"But in later cases this decision seems to have been overruled. See *William O. Smith, administrator, v. The United States*, and several other cases.

"In these claims a foreign administrator filed the petition as claimant. The cases came on for trial after the time for filing claims had expired, when the counsel for the United States contended that the complainant had no standing in court. Mr. James Lowndes, counsel for complainant, then asked leave to amend by substituting an administrator appointed by the supreme court of the District of Columbia.

"After argument, leave was granted to so amend.

"And in *Robert Montgomery v. The United States*, and other cases, leave was asked to amend by substituting the administrator as claimant when the claim had been brought in the name of a person deceased at the time it was filed.

"These motions were allowed, the court remarking that the filing of the claims in the court on behalf of a veritable individual was a satisfaction of the provisions of the act, the object of which was that the government should have due notice of all claims to be brought against it (see *MacLeane, admx., & Taylor vs. the United States*), and that owing to the peculiar circumstances of these claims they should not be allowed to perish through a strict adherence to the technical rules of courts of law. The act merely requires that the claim shall be presented. Porter, judge, dissented from this ruling, holding that the parties in whose names the claims were brought being dead at the time they were filed, the petition was a nullity, and could not be amended.

"The court, by the presiding judge, stated its opinion early in its session, that letters of administration or letters testamentary granted in any State of the United States would give authority to sue in this court. In the cases of *William O. Smith* and others, the court denied the right of a foreign administrator to bring suit.

"In *Abraham Osborn v. The United States*, the claimant (former master of the ship *Ocmulgee*) prayed damages for the personal effects and wages due to the other officers and seamen of the vessel, and their respective interests in the 'catch' in addition to his own claim. He showed no previous authority or subsequent ratification from these officers or seamen, of the names even of some of whom he was ignorant.

"The counsel on behalf of the United States demurred to the claim, and, after argument, the petition was dismissed on the ground of the want of authority in the petitioner from the parties for whom he assumed to act."

## II. THE SECOND COURT.

As shown by the Treasury statements of June 30, Balance in the Treasury, 1876, and June 30, 1877, there was paid out to claimants, on the judgments of the first Court of Commissioners of *Alabama* Claims, the sum of \$9,315,753.<sup>2</sup> On March 31, 1877, the Secre-

<sup>1</sup> Davis's Report, 12-14.

<sup>2</sup> H. Rep. 945, 49 Cong. 1 sess.

tary of the Treasury, in accordance with the provisions of the fifteenth section of the act of June 23, 1874, canceled the remaining bonds in which the fund was invested, and the balance available for distribution after payment of the judgments of the court remained stationary at \$9,703,904.89. In addition to this sum, which belonged to the fund proper, there was carried into the Treasury, as miscellaneous receipts, for coin premiums on bonds sold (\$7,500,000) the sum of \$344,393.88, and for currency premiums \$40,706.19. These sums, added to the balance of the fund, amounted to \$10,089,004.96.<sup>1</sup>

From the beginning of the attempt to adopt legislation for the distribution of the Geneva award, differences of opinion and of interest existed as to the persons to whom the money should be paid. Before the expiration of the existence of the first court various classes of claimants who were excluded from participation in the fund endeavored, but without success, to have the jurisdiction of the tribunal enlarged so as to include their claims. After the court had ceased to exist, these claimants continued their agitation with a view to have the court reestablished; and a fierce contest was waged between the conflicting interests. Those who sought to participate in the distribution of the fund may be divided into five classes:

1. Persons whose property was destroyed by the *Alabama* or the *Florida*, or their tenders, or by the *Shenandoah* after she left Melbourne—the cruisers for whose depredations Great Britain was held responsible at Geneva, and which were commonly known as the “inculpatated cruisers.”

2. Persons whose property was destroyed by vessels commonly called the “exculpated cruisers,” for whose depredations Great Britain was held not to be responsible.

3. Persons who had paid war premiums by reason of the Confederate cruisers being on the sea.<sup>2</sup>

4. Insurers who took risks on property destroyed by the inculpatated cruisers, and who asked to be subrogated to the rights of the insured.<sup>3</sup>

5. Persons who were excluded by the act of 1874 because they “did not, at all times, during the late rebellion, bear true allegiance to the United States.”<sup>4</sup>

As has been seen, the act of 1874 proceeded upon the theory of distributing the money so far as practicable among the classes on whose claims the Geneva award appeared to be based; and the jurisdiction of the court was restricted to claims directly resulting from damage caused by the inculpatated cruisers. Claimants of the first class above mentioned were therefore satisfied under the act of 1874, except in the few cases in which they did not become aware of the existence of the court until after the time for the filing of claims had expired. Consequently they played but a small part in the contest over the balance of the fund; and the same thing may be said as to the fifth class, who were unable to comply with the requirements of the act of 1874 on the subject of allegiance. The contest lay chiefly between the second, third, and fourth classes,

<sup>1</sup> H. Rep. 945, 49 Cong. 1 sess.

<sup>2</sup> H. Misc. Doc. 270, 43 Cong. 1 sess.

<sup>3</sup> H. Misc. Doc. 292, 43 Cong. 1 sess.

<sup>4</sup> H. Rep. 243, 44 Cong. 1 sess.

namely, insurers who claimed the right of subrogation, persons who paid war premiums, and persons who had suffered damage by the acts of the exculpated cruisers.<sup>1</sup>

Contentions of Various  
Interests.

The main controversy in Congress prior to the passage of the act of 1874 seems to have been in regard to the extent to which the insurance companies should be permitted to participate in the distribution; and we have seen that the act restricted such participation to the amount by which their losses, in respect of their war risks, may have exceeded the sum of their premiums or other gains in respect of such risks. Claims for war premiums, and for damage resulting from the acts of exculpated cruisers, were wholly excluded. The insurance companies maintained that the moneys paid under the Geneva award constituted essentially a trust fund, not indeed of a legal but of an equitable character, to be devoted to the reimbursement of those on whose claims the award was based. As nothing was allowed on account of the exculpated cruisers, they maintained that claims growing out of the acts of such cruisers must necessarily be excluded. On the same ground they contended that claims for war premiums could not be admitted.

But there were other interests whose advocates argued that the claims at Geneva and the wrongs on which they were based were national; that all who had suffered loss by reason of the presence of the Confederate cruisers on the sea were entitled to compensation, and that such losers comprised not merely those who lost by the inculpated cruisers, but also all those who lost by other cruisers for which the United States had sought to hold Great Britain liable. For the war premium claimants in particular it was argued that by paying such premiums they enabled the insurance companies to carry on their business, and preserved others from loss; that they thus kept American vessels on the seas, where they were subject to Confederate depredations, and that in this way the Geneva award itself owed its existence to them. When it was suggested that the merchants and others who paid war premiums indemnified themselves by increasing the price of their goods and by obtaining war profits, the answer was made that the war-premium men had to prosecute their business in competition with merchants and ship owners of other countries.<sup>2</sup> Against the doctrine of subrogation which the insurance companies sought to maintain, the argument was made that the *Alabama* claims were founded on the omission of a duty which England owed not to any person or corporation, but to the government itself, and that the doctrine of subrogation therefore could not apply.<sup>3</sup>

In the session of Congress of 1881-82 the chairman of the Committee on the Judiciary, Mr. Edmunds, reported a bill to the Senate to pay the losses by the exculpated cruisers only, excluding both the insurance companies and the war-premium men.<sup>4</sup> Meanwhile a bill was reported from the Committee

<sup>1</sup> H. Rep. 307, 47 Cong. 1 sess.

<sup>2</sup> Congressional Record, vol. 13, part 5, p. 4154.

<sup>3</sup> H. Rep. 628, 43 Cong. 1 sess.; H. Rep. 243, 44 Cong. 1 sess.; H. Rep. 663, 45 Cong. 2 sess.

<sup>4</sup> Congressional Record, vol. 13, part 5, p. 4185.

on the Judiciary of the House, which provided for the payment of the exculpated-cruiser and war-premium claimants, excluding the insurance companies.<sup>1</sup> This bill passed the House and was sent to the Senate, where an attempt was made to substitute for it a bill reviving the act of 1874, except as to its restriction upon the claims of the insurance companies. When this attempt failed an effort was made to substitute the bill reported by the chairman of the Judiciary Committee for the payment of the exculpated cruisers only.<sup>2</sup> It was also proposed to refer the matter to the Court of Claims for an opinion upon the merits of the various classes of claims, and it was also suggested that any remainder of the fund, after payment of the claims embraced in the Geneva award, should be returned to Great Britain.<sup>3</sup> None of these propositions was received with favor, and the bill was passed as it came from the House without amendment.<sup>4</sup> The bill became a law by the approval of the President on June 5, 1882.

By this act, which was entitled "An act for reestablishing the Court of Commissioners of *Alabama* Claims, and for the distribution of the unappropriated moneys of the Geneva award," the Court of Commissioners of *Alabama* Claims, as created by chapter 459 of the laws of the Forty-third Congress,<sup>5</sup> was "reestablished in the manner and with the obligations, duties, and powers imposed and conferred by said chapter, except as changed or modified by this act." The number of judges was reduced from five to three, and the title of the "presiding judge" was changed to "presiding justice." The agreement of two of the three judges was made necessary to decide any question arising before the court. The existence of the new court was limited to two years from the date of its organization; and it was provided that all claims submitted to it should be verified by or in behalf of the claimants and filed with the clerk of the court within six months from its organization, on penalty of being held to be waived and barred if they were not so filed.

As to the jurisdiction of the court, apart from that which it derived from the revival of the act of 1874, it was provided that the new court should receive and examine claims and enter judgment for the amount allowed in two classes of cases, which were as follows:

1. The first class embraced "claims directly resulting from damage done on the high seas by Confederate cruisers during the late rebellion, including vessels and cargoes attacked on the high seas, although the loss or damage occurred within four miles of the shore," but excluding the claims which had been proved under the act of 1874.

This class, it is obvious, embraced claims resulting from damage done by the exculpated cruisers.

2. The second class embraced "claims for the payment of premiums for war risks, whether paid to corporations, agents, or individuals, after the sailing of any Confederate cruiser."

<sup>1</sup> H. Rep. 307, 47 Cong. 1 sess., February 8, 1882.

<sup>2</sup> Congressional Record, vol. 13, part 5, pp. 4156-4157.

<sup>3</sup> Congressional Record, vol. 13, part 5, pp. 4157, 4160, 4162, 4185.

<sup>4</sup> Congressional Record, vol. 13, pp. 3812, 3819, 3839, 3856, 3882, 3892, 4153, 4162, 4178, 4188.

<sup>5</sup> Act of June 23, 1874.



These were the claims of the war-premium claimants.

In examining the claims in either class, it was made the duty of the court to deduct any sum received by any claimant, as an indemnity, dividend, set-off, or otherwise, so that the actual loss only should be allowed.

By section 7 of the act it was provided that the judgments rendered by the court should be paid by the Secretary of the Treasury out of the sum of money paid to the United States under the Geneva award and accruing therefrom, not appropriated to claims proved under prior acts. But in payment of the judgments, a distinction was made in section 8 between claims of the first class and those of the second. It was provided that claims of the first class should be paid before claims of the second; that if the fund should be insufficient to pay the judgments of the first class, they should be paid according to the proportions which they severally bore to the actual amount of the available fund, and that if it should turn out that the available fund was sufficient to pay judgments of the first class but not those of the second, the latter should be paid according to the proportions which they severally bore to the residue of the fund after the judgments rendered in the first class were paid.

By the ninth section of the act it was made the duty of the court to transmit to the Secretary of State a classified list of its judgments, with interest at 4 per cent from the time the loss accrued to March 31, 1877, when the bonds in which the fund was invested were canceled. Of this list it was provided that the Secretary of State should transmit a certified copy to the Secretary of the Treasury, who was directed to pay the judgments in accordance with the provisions of the act to an amount not exceeding "the amount remaining of the Geneva award and interest, as it was when actually covered into the Treasury."<sup>1</sup>

As judges of the new court the President appointed *Personnel of the Court.* Hezekiah G. Wells, of Michigan, presiding judge of the former court, as presiding justice; and James Harlan, of Iowa, and Asa French, of Massachusetts, as associates. Mr. Wells discharged the duties of presiding justice till November 10, 1884, when he resigned on account of ill health; he died on the 4th of the following April. On his resignation Judge Harlan was designated as presiding justice, and his place as judge was filled by the appointment of Andrew S. Draper, of New York.

Daniel W. Fessenden, of Portland, Maine, was appointed clerk. He had previously served as clerk of the court of Cumberland County, in Maine.

The post of counsel for the United States was filled by the designation of Mr. Creswell, who discharged the same function before the first court.<sup>2</sup>

<sup>1</sup>The decisions of the court were conclusive as to the amount due, but not as to the person to receive it. (*Williams v. Heard*, 140 U. S. 529; *Butler v. Goreley*, 146 Id. 303.)

<sup>2</sup>In an argument before Mr. Evarts, Secretary of State, in May 1879, as to whether certain awards under a convention with Mexico should be reopened, Mr. George H. Williams, who appeared for La Abra Silver Mining Company, said that the question of honor was one about which most men differed, and in this relation observed: "We recovered an award of fifteen

**Organization of the Court; Additional Legislation.** The new court was organized on the 13th of July 1882. The claims filed proved to be exceedingly numerous, and by an act approved June 3, 1884, the existence of the court was extended to December 31, 1885.

The powers of the clerk were extended for an additional period, not to exceed four months after the termination of the existence of the court, for the purpose of closing up the business of his office and depositing the records of the court in the office of the Secretary of State. The powers of the clerk were subsequently extended to June 30, 1886.<sup>1</sup>

By the act of 1882 it was provided that the judges of the new court, and the clerk, reporter, and counsel for the United States should each receive the compensation provided for them by the act of 1874. The judges therefore received compensation at the rate of \$6,000 per annum, the clerk \$3,000, the shorthand reporter \$2,500, and the counsel for the United States the fees attached to the office, or a substituted compensation of \$8,000 a year. By an act of March 3, 1885,<sup>2</sup> the salary of the clerk was raised to \$4,400 per annum. In the summer of 1885 a question was raised as to the allowance of certain disbursements which had been made by direction of the court. The grounds on which the allowance was questioned were stated in a letter of Mr. Bayard, Secretary of State, to Presiding Justice Harlan, of August 28, 1885. The judges, the clerk, the shorthand reporter, and the counsel for the United States constituted the entire official force as expressly enumerated in the statutes; and by the act of 1874, which was revived in this particular, it was provided that the court should be further allowed "the necessary actual expenses of office rent, furniture, fuel, stationery, and printing, and other necessary incidental expenses." Besides the officers above enumerated, however, there had been appointed assistant counsel, clerks, insurance experts, and other officers, who were compensated either by annual salaries or by fees. To the payment of compensation in such cases objection was made on two grounds: (1) That the phrase "other necessary incidental expenses" referred only to such similar expenses as had not before been expressly enumerated, and therefore could not authorize the payment of salaries or fees for official services; and (2) that by section 3682 of the Revised Statutes of the United States "no moneys appropriated for contingent, incidental, or miscellaneous purposes shall be expended or paid for official or clerical compensation." The expenditures to which these objections were made were defended on the ground that they were justified by precedent, similar expenditures of the first court having been duly allowed and paid, and also on the ground that they were necessary to carry into full and complete effect the object

millions by the Geneva award. A considerable portion of it remains in the Treasury. Congress is troubled to find the persons to whom it belongs, but nobody contends that that money ought to be returned." At this point Mr. Creswell, who appeared at the hearing as counsel for Mexico, interrupted and exclaimed: "Yes; they do. I do." (H. Ex. Doc. 103, 48 Cong. 1 sess. 523.)

<sup>1</sup> Acts of April 30, 1886, and June 2, 1886, 24 Stats. at L. 77.

<sup>2</sup> 23 Stats. at L. 444.

for which the court was constituted.<sup>1</sup> On September 11, 1885, certain strictures, apparently proceeding from the First Comptroller's office, having appeared in the press on the expenditures of the court, Mr. Creswell, who was mentioned as having been partly responsible, addressed to the First Comptroller a letter, in which he took exception to the impugments, and defended himself and the court. After maintaining that it was the intention of Congress to give him a salary of \$8,000 a year, and that this sum was much less than he would have received if a fee had been taxed in each case under section 824 of the Revised Statutes of the United States, he stated that there had been filed in the court 5,751 petitions, claiming in the aggregate \$28,000,000, without interest.

While the accounts were suspended a number of the attorneys subscribed to a fund, which they placed in the hands of two persons as trustees, to advance pay "to clerks or other persons" employed by the court, on such security "by pledge or otherwise" as might be obtainable. The attorneys declared that they took this step in the interest of their clients, by whom the expenses must in the end be paid, the statute requiring all expenses to be deducted from the fund before its distribution. Some of the attorneys in New York signed a paper expressing their approval of the employment of the various persons in question.

The question of legal authority was removed by an act of June 2, 1886, by which the proper accounting and disbursing officers of the Treasury were directed to audit and pay the controverted expenses.<sup>2</sup> It appears by a sworn statement of the disbursing officer of the court that the total expenses for three years, exclusive of the compensation of the officers expressly provided for by law, amounted to \$341,216.34.<sup>3</sup>

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<sup>1</sup> Mr. Harlan to Mr. Bayard, September 5, 1885. (Letter of the Secretary of State, and response thereto by the Court of Commissioners of *Alabama Claims*, Washington, 1885.)

<sup>2</sup> 24 *Stats.* at L. 77. It was held that the accounting officers of the Treasury had no authority under this statute to deduct the expenses of the Geneva arbitration from the fund. (*Weld v. United States*, 23 *Court of Claims*, 126.)

<sup>3</sup> The principal items in this sum were \$127,908.48 for assistant counsel, \$114,535.42 for printing, and \$47,038.01 for clerks, janitors, watchmen, messengers, and charwomen. The register of the court contained, besides the judges, counsel, and clerk, the following persons: Asa P. French, law clerk to judges; W. P. F. Churchill, messenger to judges; W. P. Huxford, deputy clerk; F. E. Chapin, docket clerk; Amos D. Allen, journal clerk; Arthur B. Nichols, printing and file clerk; C. S. Cowie, general clerk; A. L. Jackson, messenger in clerk's office; Walker Blaine, assistant counsel; E. Rosis, stenographer to counsel; J. Martin, messenger to counsel; J. F. Goodrich, auditor and insurance expert; F. D. Lunt, E. E. Tilden, E. G. Goodwin, and George Cowie, assistants in auditor's office; H. Griffin, messenger in auditor's office; J. W. White, H. A. Henriques, G. W. Moore, A. A. Fengar, captains in the United States Revenue Marine, marine experts; H. Conquest Clarke, court reporter; T. Culbertson, marshal; Andrew H. Allen, disbursing agent; A. L. Alexander, janitor; F. Muldoon and Napoleon Bouvet, watchmen; C. A. Clarke, general messenger. Assistant counsel on behalf of the United States, paid by fees, were: Baltimore, A. H. Hobbs; Bangor, C. Hamlin; Boston, Godfrey Morse, W. E.

The court adjourned on the 31st of December 1885,  
*Work of the Court.* the day fixed by law for the termination of its existence.

The work done by the court from its organization on July 12, 1882, to its adjournment on December 31, 1885, was as follows:

*First-class (exculpated-cruiser) claims.*

Number of cases docketed .....	1,602
Judgments rendered for claimants.....	994
Judgments rendered for the United States .....	378
Cases dismissed.....	230
Amount recovered in judgments for claimants, principal ..	\$2, 153, 036. 25
Amount recovered in judgments for claimants, interest ...	1, 192, 980. 07
Total .....	3, 346, 016. 32

*Second-class (war-premium) claims.*

Number of cases docketed .....	4, 149
Judgments rendered for claimants' cases .....	3, 662
Judgments rendered for the United States.....	260
Cases dismissed.....	267
Principal of judgments recovered by claimants.....	\$10, 705, 371. 43
Interest recovered by claimants .....	5, 607, 573. 10
Total .....	16, 312, 944. 53

Separate judgments were rendered for 10,910 claimants, and the whole number of judgments was 11,377.<sup>1</sup>

The judgments of the first class were paid in full;  
*Payment of Judgments.* and in order that the proportion paid to claimants of the second class might be increased, it was provided by an act of June 2, 1886,<sup>2</sup> that to the balance of \$9,703,904.89, belonging to the fund proper, there should be added the money derived from premiums on the sale of bonds, making in all the sum of \$10,089,004.96. To this sum there was further added the estimated value of the furniture and property of the court. From the aggregate sum so ascertained it was provided that there should be subtracted the expenses of the court actually incurred

Spear, Payson E. Tucker, S. H. Phillips, Moses Williams; Charleston, South Carolina, John Wingate; Chicago, R. S. Tuthill; Ellsworth, Maine, H. E. Hamlin; Honolulu, Hawaii, F. P. Hastings; Lewiston, Maine, W. H. White; London, England, E. J. Moffat; New Bedford, C. T. Bonney; New London, Samuel Park; New Orleans, J. S. Whitaker, J. F. Whitaker, C. R. Rice; New York City, G. G. Frelinghuysen, Hamilton Fish, jr., R. H. Strahan, C. C. Suydam, B. Platt Carpenter; Philadelphia, J. H. Heverin; Portland, G. M. Seiders; Portsmouth, New Hampshire, W. Hackett; San Francisco, W. W. Morrow, F. S. Stratton; Savannah, J. O. Ferrill; St. Louis, Eleueious Smith; Wilmington, Delaware, John C. Patterson.

<sup>1</sup> H. Rep. 945, 49 Cong. 1 sess.

<sup>2</sup> 24 Stats. at L. 77.

in the transaction of its business and yet to be incurred by closing up its affairs.<sup>1</sup>

The rules adopted by the second court were substantially the same as those adopted by the first, with such modifications as circumstances rendered necessary. The rules of the second court were as follows:

"I. The clerk of the court is directed to file of record all claims which may be transmitted to him, and to enter the same on the docket in the order of time in which they may be received.

"Claims transmitted by mail may be addressed to 'D. W. Fassenden, esq., clerk of the Court of Commissioners of *Alabama* Claims, Washington, D. C.'

"II. All claims must be verified by the affidavit of the claimant, and filed in this court at or before 12 m. of the 14th day of January 1883, or where good reason can be shown for a failure of the claimant to verify his own claim, then by someone on his behalf.

"III. Every claim shall be stated in a petition addressed to the court and signed by the claimant or his attorney.

"The petition shall set forth—

"1st. The title of the case, with the full Christian names and surnames of all the claimants, the places and times of their birth, and the places of their residence between the 13th day of April 1861 and the 9th day of April 1866, both inclusive.

"If any of the claimants be naturalized citizens, an authenticated certificate of their naturalization shall be appended to the petition, and the petition shall also state whether the claimants, or any of them, have been naturalized in any other country than the United States, and if not so naturalized, whether any and what steps have been taken toward being so naturalized.

"2d. A plain and concise statement of the facts and circumstances, giving place and date, free from argument, and stating all assignments and transfers, whether in whole or in part; also whether the claimant, or anyone on his behalf has received any sum or thing of value by way of compensation, indemnity, dividend, set-off or otherwise upon his claim, and if so, from whom, when, and the specific amount in each case;<sup>2</sup> and further that the claimant at all times during the period included within the dates hereinbefore named in this rule, bore true allegiance to the United States.

"3d. The prayer, in which the claimant shall state distinctly the amount of the actual loss or damage for which he asks judgment, the class under which he claims, and the date from which he claims interest thereon.

"The claimant shall also give the post-office address of himself and of his attorney; and may append to his petition, as exhibits, the instruments or documents to which it refers, but shall not insert the same in the body of

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<sup>1</sup> When the act of June 2, 1886, was passed, several new bills were pending before Congress in relation to the distribution of the Geneva award. One of these bills proposed to provide for the arrangement and printing of the opinions of the court in the several controverted cases. Another proposed that the payment of judgments should be made to insolvents in certain cases, instead of to their assignees. Yet other bills proposed to create a new court and a new fund, out of which a new class of claimants should be paid. All these proposed measures failed to pass. (H. Rep. 945, 49 Cong. 1 Sess.)

<sup>2</sup> It was held to be insufficient under this rule for the claimant to allege that neither he, his assigns, nor his legal representatives had "received, at any time or in any way, compensation or indemnity for the loss of said effects from any insurance company, insurer, or otherwise."

the petition. Immediately upon the filing of any petition, fifty<sup>1</sup> copies of the same and the accompanying documents shall be printed in octavo form, under the direction of the clerk, for the use of the court and counsel.

"Claimants must file separate petitions under each of the classes of claims named in section 5 of the act entitled, 'An act reestablishing the Court of Commissioners of *Alabama* Claims, and for the distribution of the unappropriated moneys of the Geneva award,' approved June 5, 1882; but any number of claims by the same person, coming under the same class, may be included in the same petition.

"IV. Parties having a common interest, growing out of the destruction of the same vessel or its cargo may unite in one petition for the recovery of their respective claims, which may be heard together, but separate judgments shall be rendered in the case of each claimant.

"V. Any person of good moral character admitted to practice as attorney or counsel in the supreme court of any State or Territory or the District of Columbia, or in any of the Federal courts, on filing with the clerk a written statement of the date and place of such admission, with his name and post-office address in full, may, on motion, be admitted to practice in this court.

"VI. It shall not be necessary for the United States to deny specially, in writing, the validity of any claim; but a general denial of every claim shall be entered of record by the clerk as of course, and thereby every material allegation shall be considered as put in issue by the United States.

"Objections as to the law of the case may be raised by the United States at any stage of the proceedings by demurrer, stating the grounds of such objections with reasonable certainty.

"VII. Testimony to be used in this court may be taken before a commissioner empowered by any circuit or district court of the United States to take testimony, on a rule entered of record in this court for that purpose by either party in any pending case, provided twenty days' notice be given to the adverse party; but nothing herein contained shall prevent the taking of testimony before any other person, with the leave of this court, nor prevent counsel from accepting, by agreement in writing, a shorter notice than twenty days.<sup>2</sup>

"VIII. It shall be the duty of the counsel of the claimant, at least ten days before the day of hearing, to file with the clerk of the court fifty copies of a brief (printed in octavo form) of the argument in behalf of the claimant.<sup>3</sup>

"IX. Claims supported by printed or written testimony shall be first heard in the order in which they stand on the docket, unless otherwise specifically ordered by the court; and afterward those claims shall be heard in support of which the claimant may desire to introduce oral testimony.

"X. In cases where the amount claimed exceeds the sum of one thousand dollars, the claimant shall be at the expense of printing his own brief and testimony. In cases not exceeding that amount, the printing shall be done under the direction of the clerk of the court, at the expense of the United States.

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<sup>1</sup> November 16, 1882, this rule was amended by substituting "sixty-five" for "fifty."

<sup>2</sup> It has been held that section 823 of the Revised Statutes of the United States limiting the compensation of commissioners to take testimony is inapplicable to a commissioner appointed by the *Alabama* claims court. (*Powers v. Manning*, 154 Mass. 370, 28 N. E. 290.)

<sup>3</sup> November 16, 1882, this rule was amended so as to read: "It shall be the duty of the counsel of the claimant, at least ten days before the day of hearing, to file with the clerk of the court sixty-five copies of a brief (printed in octavo form) of the argument in behalf of the claimant, and a like number of copies of the testimony."

"XI. The time to be occupied in the oral arguments of counsel shall be regulated by the rule in force in the Supreme Court of the United States.

"XII. Whenever any deposition or documents shall have been filed in any case before this court, either party to any other case may use such testimony on the hearing thereof: *Provided*, That the party so desiring to use such testimony in a case in which the same was not originally taken shall file a notice in the case in which such testimony is sought to be used five days before the hearing thereof of his intention so to do, specifying therein particularly the depositions or documents sought to be used and the case or cases in which the same were originally taken.

"XIII. In the case of any claimant who may be absent from the United States at the time of the making, or of presenting, his petition, such petition may be presented and verified by the attorney in fact of such claimant, or by any agent specially authorized thereto, or by any person acting as agent or next friend; but in every case of a petition filed without precedent authority specifically given, the court will require subsequent ratification of such petition or claim by the claimant.

"Such agency or ratification shall, in every case, be duly established by proof to the satisfaction of the court."

On the 6th of October 1882 the court adopted the following additional rules:

"XIV. All attorneys admitted to practice in the Court of Commissioners of Alabama Claims, as created under the law of Congress, approved June 23, A. D. 1874, will be recognized as attorneys in this court, reestablished under the law of Congress, approved June 5, 1882.

"XV. Attorneys for admission to practice in this court, besides complying with the other requirements of the rules, must be present when a motion is made for their admission."

On the 20th of November 1882 the court ordered that "in printing testimony the formal parts of documentary evidence upon which no question arises may be omitted, the counsel agreeing thereto by a written instrument to be filed in the case." On the 1st of November 1883 the clerk of the court issued a circular letter containing minute directions as to printing, so as to secure uniformity; and on the 20th of March 1884 he issued a further circular on the subject.

On the 5th of June 1883 the court adopted the following instructions to commissioners employed to take testimony:

"COURT OF COMMISSIONERS OF 'ALABAMA' CLAIMS,

"June 5, 1883.

"*Ordered*, That the clerk of this court be, and he is hereby, directed to issue the following instructions to commissioners appointed and authorized to take testimony to be used in the trial of causes pending before it, viz:

"First. That so soon as the testimony taken in any case in which the sum claimed is one thousand dollars or less shall have been concluded by such commissioner he shall forthwith cause the same to be carefully enveloped, sealed up, and properly indorsed with the number of the case, and promptly forwarded by the United States mail, or other safe conveyance, to the clerk of this court.

"Second. That in any case in which the sum claimed is more than one thousand dollars, when the testimony shall have been so taken and printed under the supervision of such commissioner, at the expense of claimant,

<sup>1</sup> June 9, 1885, the court ordered, "That, hereafter, all motions or papers of any kind, in adjudicated cases, shall be presented by the attorneys of record in such cases, or by some attorney of this court in their behalf, in open court, and be approved by the court before the clerk is authorized to file the same."

it shall be forthwith sealed up and forwarded in like manner to the clerk of this court.

"Third. That in any matter of contention between a commissioner of this court and claimant as to the rate and amount of fees charged by such commissioner for his official service in any case, the rate named in the statutes of the United States must govern.

"Fourth. That testimony thus taken by any commissioner must not be withheld from this court on account of nonpayment of fees charged in excess of the rate prescribed by the laws of the United States for such service.

"Fifth. That in case of a contention between any such commissioner and a claimant in relation to rate or amount of fees charged for official service in any case, for which service a rate of fees is not prescribed by the laws of the United States, the question may be submitted to the clerk of this court, to be decided by him, subject to the approval of the court; but the testimony must not be withheld from the court during the pendency of the controversy."

**Procedure as to War  
Premiums.**

From time to time, as occasion arose, the court issued orders in relation to the proof and valuation of war premiums. These orders were as follows:

**"COURT OF COMMISSIONERS OF 'ALABAMA' CLAIMS,**

*"March 1, 1883.*

"Ordered, That in the disposition of claims of the second class, for the payment of claims for war risks, this court will, in its estimate of the value of scrip dividends, receive proof of its market value at the date of its issue, and will be governed by that proof when properly submitted.

Attest:

D. W. FESSENDEN, *Clerk.*"<sup>1</sup>

**"COURT OF COMMISSIONERS OF 'ALABAMA' CLAIMS,**

*"March 7, 1883.*

"Ordered, That the court will designate, in such places where policies covering war risks were issued during the war of the rebellion, as it may deem necessary, competent persons who may, at the request of the claimants under the second class, and at the proper cost and expense of such claimants, make up from the books, records, and data of the insurance companies, schedules showing the particulars concerning each premium for war risk paid, and for which a claim shall have been duly filed, including the number and date of the policy, the date of the insurance, in whose name such insurance was made, the sum insured, to whom payable, and the subject of the risk, the amount of war and marine premium, the amount of war premium, when such premium was paid—whether by note or cash payment, and what, if any, percentage of scrip was declared or issued for or on account of such premium, and the face value of such scrip.

"Such schedules, when prepared and verified in each case in which they are to be used, by the oath of the party preparing them, either in this court or before some commissioner appointed by the court to take testimony in cases coming before it, in like manner as other testimony in said cases is verified, and subject to the right of cross-examination on the part

<sup>1</sup> June 1, 1883, counsel for the United States issued, for the information and guidance of attorneys for claimants of class 2, a table showing scrip dividends declared by certain insurance companies. He announced that he would insist upon a deduction of those dividends from the amounts of premiums paid. As stated in the rule, the measure of value adopted for that purpose was the market value of the scrip at the date of its issuance. The court was able, however, as the result of the trial of a number of cases, to fix the valuation of the scrip of certain companies at a certain figure for each year from 1861 to 1865, inclusive.



of the United States, may thereafter, except as hereinafter provided, be introduced in evidence either by the claimants or by the United States, upon the trial of the respective causes to which they relate, and shall be received as *prima facie* evidence of their contents, except as to the interest of such claimants in the premiums in such schedules referred to; but nothing herein contained shall be deemed to prejudice or affect the right of or prevent the counsel on behalf of the United States or counsel for any claimant from contradicting any such schedule, or from introducing proof of the incorrectness of the same or any part thereof, and no such schedule shall, after objection thereto by the counsel on behalf of the United States, or the counsel for the claimant, be received in evidence as aforesaid, unless the person making the same and the books, records or data, from which the same was made, shall, after ten days' notice in writing by the counsel making objection to the introduction thereof to the opposing counsel, be produced for examination and inspection by said counsel before this court.

"Nothing herein contained shall be deemed to prevent any claimant from making proof of his claim in any manner other than hereinafter provided, and in conformity with the rules of law."

"COURT OF COMMISSIONERS OF 'ALABAMA' CLAIMS,

*"April 27, 1883.*

"*Ordered*, That in all cases under the second class coming before this court claimants are required to file with the clerk, at least ten days before said cases are heard, the original policies of insurance upon which payments for war premiums were made, where said policies are in existence and can be produced. Where the original policies can not be produced, their place may be supplied by copies thereof duly sworn to before any officer qualified to administer oaths.

"Attest:

"D. W. FESSENDEN, Clerk."

"COURT OF COMMISSIONERS OF 'ALABAMA' CLAIMS,

*"February 19, 1884.*

"The court has considered all the evidence before it upon the question of the practice, which is alleged to have been followed by the Columbian Insurance Company, of New York, of making certain rebates on premiums paid by parties taking out policies in that company, and it is thereupon—

"*Ordered*, That the rule adopted, and hereafter to be followed by the court in respect to such policies, will be as follows:

"Except in cases where it is specifically shown that no such rebate was in fact allowed, a deduction will be made from the amount of war premiums claimed to have been originally paid to said company, of 10 per cent where the insurance was on vessel and freight, and of 15 per cent where the insurance was on merchandise.

"But this rule shall not be construed as relieving claimants from showing, under the existing rules and practice of the court, the actual amount of scrip, rebate, or deduction in any form, made by the said company on said policies.

"Attest:

"D. W. FESSENDEN, Clerk."

"COURT OF COMMISSIONERS OF 'ALABAMA' CLAIMS,

*"November 13, 1884.*

"*Ordered*, That in view of the limited time prescribed for the duration of this court, and the large number of cases of the second class remaining untried, counsel in charge of such cases are hereby directed to file immediately all necessary vouchers therein, so as to enable the insurance examiner to prepare his reports with the least possible delay.

"Such vouchers consist of:

"First. Original policies.

"Second. Copies of policies under oath made prior to appointment of examiners.

"Third. Certificates of examiners under oath before Unit  
missioners.

"Fourth. All other evidence showing payment of war pr

"Certificates of notaries public to schedules, and other s  
verification, are not admissible to establish the payment of

"Attest:

"D. W. FESSE:

"COURT OF COMMISSIONERS OF 'ALABAMA'"

"MEMORANDUM OF DECISION.

"Recurring to the question raised yesterday as to the nec  
inability to produce original papers, as a condition prece  
missibility of copies thereof, or other secondary testimony  
payment of premiums for insurance against war risks, afte  
tion, the court has come to the conclusion that the well-u  
ciples of law bearing on that question must be observed.

"But it appearing to the court that in many cases the c  
tries of insurance contracts, made at the date of the issu  
are in substance duplicates of said contracts, in which the  
said contracts are all set forth, and on which subsequen  
are usually entered, and which modifications are less freq  
on the policies delivered to the insured, such original bod  
appear to be in fact substantial duplicate policies may  
primary testimony.

"In cases submitted during this week, in which judgm  
announced in favor of claimants, and in which the testin  
as to the questions above indicated, an order will be ente  
certification of judgments, preliminary to the vacation  
satisfactory testimony shall not be supplied within the ne

"To obviate the necessity of recalling witnesses in thes  
icated, and subsequent cases of like character, claima  
shall so prefer, produce the company's books in this court

On the 26th of March 1883 the co  
Practice as to Amend- "all motions to amend shall be in v  
ments.

with the clerk in the respective cas  
apply;" that "notice thereof accompanied by a copy  
amendment" should "be given to the counsel for the Uni  
time of filing the same;" and that such motions woul  
"when said cases were heard, unless sooner called up  
counsel or by direction of the court." Where, after the  
claims had expired, a motion was made for leave to ame  
inserting in it a new item of war premium, the court rel  
on the ground that the item constituted a new and distinc

On the 26th of January 1883 the co  
Order of Business. the delay on the part of counsel for c  
pare their cases for hearing \* \*

necessity for immediate action looking to the dispositio  
within the time fixed by law," announced that on the 14  
the docket would be called down to case No. 1500, incl  
cases would be disposed of in their order, unless for good  
postponement should be granted. Counsel were therefo  
they should at once proceed to take testimony in the ca  
and that "unnecessary delay" in so doing would not be  
ground for further postponement. On the 29th of June

<sup>1</sup> *Ballard v. United States*, No. 444, class 2.

adjourned to the first Wednesday in the ensuing October, at the same time announcing that when it reassembled it would "immediately thereafter begin the second regular call of the calendar, commencing with No. 1 and proceeding consecutively with the cases untried in the order of their numbers; reserving, however, the right to group cases relating to the same ship or subject-matter until further order of the court, provided counsel for the claimants give at least ten days' notice to the counsel on behalf of the United States of the cases they may desire to so group." On the 18th of February 1884 an order was made to the effect that on and after the third Monday of the next month cases tried, or submitted to the court on testimony and briefs, would not be suspended for the production of further testimony, but that final judgment would be entered on the evidence then before the court.

By the third section of the act of June 3, 1884, extending the duration of the court, it was provided that the court should proceed with all convenient dispatch to the final adjudication of all claims of the first class, and that, as soon as it should be satisfied that the aggregate of the judgments of that class with interest would not exceed the amount of the fund after the deduction of expenses, it should report a list of all such judgments then rendered in order that they might be paid. Any subsequent judgments of the first class were directed to be reported in like manner, as from time to time they should be rendered. Acting upon these provisions the court on June 19, 1884, directed the clerk to prepare a complete list of judgments of the first class, with interest reckoned on each one. On the 26th of July notice was published that, in accordance with the requirements of the law, a report had been made of all judgments of the first class from the organization of the court to the 22d of July 1884, inclusive. From this list, however, there were omitted certain cases in which "motions for vacating judgments and for new trials" were pending.

These, and the cases in which no judgment had been rendered, yet remained to be disposed of. To facilitate their disposition the court on the 22d of July ordered that, upon its reassembling on the 15th of the ensuing October, all cases of the first class should be peremptorily called in their numerical order, and that those not ready for trial should be dismissed until special and satisfactory reasons should be shown to the contrary; and that as soon as cases of the first class should have been disposed of a peremptory call should be made, and enforced by a like penalty, of all remaining cases of the second class, "it being understood, however, that, as heretofore, counsel for claimants may at the trial group their cases of each separate class, with the consent of the counsel on behalf of the United States first had and obtained." February 20, 1885, the court made a peremptory order, requiring all cases not previously disposed of to be ready for trial on the 20th of the ensuing May, subject to be called up at any time thereafter in their numerical order; and on the 27th of July it was ordered that on and after the 5th day of the ensuing October cases remaining on the docket untried and not dismissed should be called and finally disposed of in their numerical order, commencing with the first untried case. Finally on November 23, 1885, it was ordered that all motions for rehearing or for the introduction of further evidence should be presented on or before the 2d of December, and that no such motions would be received after that date.

On questions of substantive law the second court generally followed the decisions of the first court wherever they were applicable. But on the question

**Meaning of Protection of United States.** as to who were entitled to the "protection of the United States in the premises," the second court departed from one of the opinions of the first court. We have seen that the latter court disallowed claims for losses by British subjects serving on American vessels which were destroyed by Confederate cruisers, on the ground that it did not appear to be the intention of Congress to admit British subjects to participate in the distribution of the money paid by their government under the Geneva award; and it has been said that this was "the only case where the written opinion of the judges did not meet with a very general acceptance."<sup>1</sup> As the act of 1874 did not clearly disclose an intention to allow such claims, the first court argued that Congress did not intend to allow them, since they were not among the purposes for which, as shown by the diplomatic correspondence and the terms of the award, "Great Britain supposed she was paying" the money. The second court naturally rejected this argument, which was at variance with the principle on which the act of 1882 was based, and held that the claims of British subjects serving on board of American vessels were admissible.<sup>2</sup>

The question as to whether British subjects were entitled to the protection of the United States in the premises was raised again in the case of certain members of the association of underwriters known to the commercial world as the London Lloyds. In this case the court held that the claimants were not entitled to the protection of the United States. The claim to the protection of a government might, said the court, embrace (1) a person's natural, civil, and political rights; (2) his rights of property; and (3) his right of freedom from needless restraint. The claimants in question were not at the time of their loss subject to the jurisdiction of the United States; they were not citizens of the country; they did not reside within its territorial limits; nor were they sailing under its flag on the high seas. They had not given their allegiance, either temporary or permanent, to the United States, and consequently had not, said the court, established the relation between themselves and the Government of the United States on which a personal right to claim its protection depended. The only question that remained was whether they could claim the right of protection in respect of the property that was insured by them and destroyed. In certain cases, said the court, the owner of property might be entitled to the protection of his sovereign in respect of property within the jurisdiction of another sovereign, but this right of protection depended upon the existence of title in the property. In the present case the claimants were not owners of the property at the time of its loss, nor did they possess a right of control in respect of it. They were merely insurers. Their demand was not in reality for the loss of property, but for indemnity on account of a loss in their business as insurers of certain property on the high seas under the flag of the United States. It was not contended that the insurance contracts passed the title to the property from the insured to the insurers; and it could not, said the court, be maintained

<sup>1</sup> Hackett's Geneva Award Acts, 75.

<sup>2</sup> *Cassidy v. United States*, No. 144.

that the claimants were entitled to the protection of the United States in the conduct of their business as insurers, since it was shown that this business was conducted exclusively in London and within the exclusive jurisdiction of Great Britain. Judgment was therefore entered for the United States.<sup>1</sup>

The question of protection also arose in the case of certain American claimants for premiums paid for insurance against war risks on goods shipped on British vessels. Objection was made to the allowance of these claims, on the ground (1) that as the shipments were made on neutral ships there was no war risk to be insured against, and (2) that as to such shipments the claimants were not entitled to the protection of the United States in the premises. The court deemed neither of these objections well founded. The court held that it was a matter of interest to the United States, during the civil war, that its commerce should be kept up even in foreign ships; and that American shippers ought not to be denied relief because, when a large part of the American merchant marine had been driven from the seas, they used foreign ships. Harlan, P. J., dissented.<sup>2</sup> The court said:

"The more restricted right which an alien may have to demand protection for his person and property of the state where he is temporarily sojourning, does not at all take the place of, or interfere with, this higher claim to the protection of his own government. Behind this special and present protection which, under the recognized law of nations, the flag affords, there is the final right of appeal to the government of his allegiance, which every American citizen has at all times and in all places. And it is this broader and more comprehensive right which we think was contemplated by the framers of the statute."

Harlan, P. J., arguing against this view, maintained that the goods in question were at the time under the protection of Great Britain and not of the United States. He placed much emphasis on the position of the United States in respect of claims growing out of the bombardment of Greytown, likening the property of an American citizen on a British ship on the high seas to that of the French subjects in Greytown. When the French Government presented claims for the destruction of their property, the United States replied that they must look for indemnity to the community to whose protection they had committed their persons and property. He also contended that the words "entitled to the protection of the United States in the premises" could only refer, when the subject-matter of the act was examined, to "*property sailing on the high seas under the flag of the United States.*"

It was held, following the decision of the first court, that a colorable transfer of a vessel of the United States which had been captured by a Confederate cruiser to the British flag, in order to rescue her from the hands of the captors, did not forfeit the protection of the United States.<sup>3</sup>

Another important question decided by the court was that as to what constituted a Confederate cruiser within the meaning of the act of 1882. This question did not arise before the first court, because the cruisers for whose acts

<sup>1</sup> *Biscoff et al. v. United States*, No. 5693, class 1.

<sup>2</sup> *The Pacific Mills v. United States*, No. 793, class 2.

<sup>3</sup> *Tyler v. United States*, No. 4438, class 1.

claims were allowed were specifically designated. The act of 1882, however, included Confederate cruisers generally. The construction to be placed upon this term was first decided by the court in the case of the *Roanoke*, a merchant steamer plying between New York and Havana. On September 29, 1864, when on her regular voyage to New York and when about sixty miles out from Havana on the high seas, she was forcibly taken possession of by one John C. Braine and certain officers and men under his command, all of whom had gone on board the vessel at Havana in the disguise of passengers. Subsequently the vessel was burned by her captors. Her owners made a claim for her loss on the ground that Braine, who held a commission from the Confederate secretary of the navy, had made his way from Bermuda to Matanzas on a schooner called the *Resolution*, which, it was contended, was to be considered for the purposes of the case as a Confederate cruiser. The schooner, however, was unarmed, and on her arrival at Matanzas was condemned and sold, and Braine and his men went as passengers to Havana, where they remained until they boarded the *Roanoke*. The court held that neither the *Resolution* nor Braine and his men could be considered as "Confederate cruisers;" that the term "Confederate cruisers" in the act of 1882 "was intended by Congress to include only armed vessels, public or private, fitted for hostile operations upon the high seas, and acting under the authority of the Confederate government."

The same question was next determined in the case of the *Boston*, which was one of the vessels excluded from consideration by the Geneva tribunal for want of evidence. The *Boston* was originally a steam towboat, in the merchant marine service, plying on the Mississippi River between New Orleans and the Gulf of Mexico. She was captured on the night of June 9, 1863, by one James Duke and certain other persons who, armed with short rifles, sabers, and pistols, came on board by means of a barge or rowboat, overpowered the crew, and caused the *Boston* to be steamed down the river to the Gulf of Mexico, where he formally declared her to be a prize of the Confederate States, put her crew under duress as prisoners of war, and ran up the Confederate flag. On the same night, using the *Boston* for the purpose, Duke and his men captured and destroyed the bark *Lenor* near the mouth of the Mississippi River. The court held that the *Boston* was not a "Confederate cruiser." The *Boston* was not, said the court, speaking through Judge Harlan, armed or "fitted for hostile operations on the high seas." She was in a condition at the time to be used only as "a transport to carry the assailants to their intended victims and plunder," and differed from the barge used by the same men in her capture only in being propelled by steam, while the barge was propelled by oars. "In the opinion of the court," said Judge Harlan, "the mere presence of armed men on board and in control of a vessel on the high seas is not sufficient to establish the character of the craft as a Confederate cruiser within the meaning of the statute. And if the vessel used in effecting this capture had been of such construction, or so armed and equipped as to be itself an implement of warfare on the high seas, being under the control of an effective force of armed men, it would still have been necessary to prove by competent evidence that the expedition was at the time acting under the authority of the Confederate government to bring it within the requirements of the statute."

The claimants endeavored to show that James Duke was an officer in the Confederate navy (1) by the oral testimony of witnesses as to what he said before, at, and after the capture of the *Lenox*; (2) by a certified copy of the proceedings of an alleged Confederate prize court under whose decree the *Boston* was seized and sold; and (3) by a copy of the Confederate Naval Register containing, under the head of "deaths, resignations, casualties," the entry: "Duke James, acting master Nov. 20, 1863." The court held that his character as an officer was not satisfactorily proved. "But," said Judge Harlan, "if it had been conclusively proved that said Duke was, at the time of the capture of the *Lenox*, an officer in the Confederate navy, that fact and his presence in command of a ship on the high seas would not, in the opinion of the court, considered in the light of all the decisions cited on the trial, raise the legal presumption that he was acting under the authority of the Confederate government, unless it were also shown that the ship was a public vessel in commission, or its tender, belonging to the Confederate government. Even if found in command of a private vessel sailing under the authority of a letter of marque, his authority would depend on the letter rather than his commission as a naval officer. In the case at bar it is made clear to the court, from the testimony produced, that the steamer *Boston* was not a public vessel in commission belonging to the Confederate government. And it is equally clear that it was not sailing under a letter of marque, nor is it claimed that it was. Hence, after a patient review of all the facts brought out in the testimony, and a mature consideration of all the principles of law, so ably and exhaustively presented in the argument, by learned counsel for claimants, as well as by government counsel, the court is compelled to conclude that the bark *Lenox* was not captured by a Confederate cruiser within the meaning of the act of June 5, 1862."

The question as to what constituted a Confederate cruiser was also decided in the case of the steamer *Ike Davis*, which was seized on the high seas by men professedly in the service of the Confederate government who had gone on board of her at Matamoras as passengers for New Orleans. The court said that the case thus fell within the principle laid down in the case of the *Roanoke*. It was alleged, however, that the captors of the *Ike Davis* "ran said steamer into the port of Lavacca, Texas, and subsequently instituted proceedings against said vessel as a prize of war in the Confederate States court at Gonzales, Texas," under which the steamer was condemned and sold; and it was argued for the claimant that the findings of this prize court should have the same effect as if the capture had been made by a duly commissioned cruiser. To this the court replied (1) that there was "nothing in the evidence to show upon what facts the adjudication of this so-called prize court was based;" and (2) that the *Alabama* claims court could not recognize the Southern confederacy as being competent to establish prize courts.<sup>1</sup>

The "Confederate cruiser" question was finally discussed and decided in the case of the ship *Alleganeau*, which was seized on the night of Octo-

<sup>1</sup>On this point the court cited *The Lilla*, 2 Sprague, 177; 2 Clifford, 169; *Miller v. U. S.*, 11 Wallace, 268; *Texas v. White*, 7 Id. 700; *Hickman v. Jones*, 9 Id. 197; *Knox v. Lee*, 12 Id. 437; *Huntington v. Texas*, 16 Id. 402, 411; *National Bank of Washington v. Texas*, 20 Id. 72, 83.

ber 28, 1862, in the Chesapeake Bay, by eighteen officers and men of the Confederate navy, commanded by Lieutenants John Taylor Wood and S. Smith Lee. These officers were commissioned officers in the Confederate navy, and were at the time acting under the special orders of the Confederate secretary of the navy, and the men who were with them were specially detailed from the James River squadron. They came overland to the Chesapeake Bay from the *Patrick Henry*, an armed and commissioned Confederate vessel, for the purpose of preying upon United States merchant vessels; and, having secured two or three small vessels of not more than fifteen or twenty tons, had been cruising about for two or three nights when they attacked the *Alleganean*. The court said:

"The meaning of the term 'Confederate cruiser' was defined by this court in the case of the *Roanoke* (*Warren v. United States*), French, J., delivering the opinion in these words: 'We can reach no other conclusion than that the phrase "Confederate cruiser," as found in the act of 1862, was intended by Congress to include only armed vessels, public or private, fitted for hostile operations upon the high seas, and acting under the authority of the Confederate government.'

"In the case of the *Lenox* (*Lindsey v. United States*), Harlan, J., delivering the opinion of the court, said: 'In the opinion of the court the mere presence of armed men on board and in control of a vessel on the high seas is not sufficient to establish the character of the craft as a Confederate cruiser within the meaning of the statute. And if the vessel used in effecting this capture had been of such construction, or so armed and equipped as to be itself an implement of warfare, on the high seas, being under the control of an effective force of armed men, it would still have been necessary to prove by competent evidence that the expedition was at the time acting under the authority of the Confederate government to bring it within the requirements of the statute.'

"Proceeding, the court said: 'But if it had been conclusively proved that said Duke (the commander of the Confederate force) was at the time of the capture of the *Lenox* an officer in the Confederate navy, that fact, and his presence in command of a ship on the high seas, would not, in the opinion of the court, considered in the light of all the decisions cited on the trial, raise the legal presumption that he was acting under the authority of the Confederate government, unless it were also shown that the ship was a public vessel in commission or its tender, belonging to the Confederate government. Even if found in command of a private vessel sailing under authority of a letter of marque, his authority would depend on the letter rather than his commission as a naval officer.'

"From these decisions, in order to constitute a 'Confederate cruiser' there must have been, first, an armed vessel, and second, the vessel must have been a commissioned vessel of the Confederate navy, or she must have carried letters of marque from the Confederate government. Further than this, the fact that the crew were a part of the Confederate naval forces, and were acting under authority of the Confederate government, would not supply the absence of letters of marque.

"The vessels employed in the destruction of the *Alleganean* were not armed, they were not in commission, and they had no letters of marque. The official and authorized character of the men could not do away with the necessity of authority running to the vessels themselves, nor could the fact that the men were armed supply the lack of armament upon the vessels in order to bring them up to the character of 'cruisers.'

"The learned counsel for the claimants, with much earnestness and ingenuity, undertakes to meet the difficulty upon the theory that the vessels employed were tenders to the *Patrick Henry*, a duly commissioned and armed vessel of the Confederate navy, and argues that a cruiser can send her boats and men off to a distance and commit depredations at arm's length, and that the damage in this case was in fact and effect done by the *Patrick Henry* herself. It is difficult to see how this view or the statement of Wood that the boats were tenders of the cruiser can be sustained in the



face of his testimony that 'I went at once to Matthews county, Virginia, near New Point Comfort, and there found a suitable boat, fitted her as a man-of-war launch' (p. 57, Record), and in the face of the testimony of Lee that 'We had two small boats that we obtained on the bay shore, with sails and a sailing skiff, we captured from two Union men. No boats were brought from Richmond or from any Confederate cruiser' (p. 20 Record). In the opinion of the court, the claim that these boats were tenders attached to the cruiser must fail, and with it the suggestion that the damage was done by the armed vessel through the instrumentality of boats attached to her.

"So far as being effective in this matter, the *Patrick Henry* might as well have been in the Arctic Ocean as over in the James River. Any other body of men to the same number might have done the same work. The force making the capture in this case received no support or assistance from any armed or credentialed war vessel. \* \* \* The damage was done by the men alone, and not by a vessel, when the act contemplates only damages wrought by an authorized vessel fitted for belligerent operations upon the high seas."

Meaning of "High  
Seas."

We have seen that by section 5 of the act of 1882 the court was directed to determine claims for damages done on the "high seas," including vessels and cargoes "attacked on the high seas, although the loss or damage occurred within four miles of the shore." In the case of the *Alleganean*, which has just been referred to, it was held that the Chesapeake Bay, being within the territorial jurisdiction of the United States, was not a part of the "high seas" within the meaning of the act of 1882, which was construed as employing the term in its international sense.

The "high-seas" question was also discussed and decided in the case of the ship *John H. Jarvis*, captured May 16, 1861, by the Confederate cruiser *Musie*, near the mouth of the Mississippi River. It being admitted that the attack and the capture took place within four miles of the shore, counsel for the United States moved to dismiss the claim on the ground that as the attack was not made beyond four miles from the shore the case did not fall within the provisions of the act. On the other hand it was contended by counsel for the claimant that the term "high seas" should be held to mean the waters of the sea from shore to shore, commencing and terminating at low-water mark. The court admitted that in admiralty proceedings the term "high seas" usually meant "the waters of the ocean from shore to shore at low-water mark," but observed that it did not follow that Congress so used the term in the act of 1882. The jurisdiction of a nation was, said the court, generally held to extend over a belt of water a marine league or about four statute miles from the shore, and with reference to this belt the term high seas was used to denote waters at a greater distance from the shore. In which sense did Congress use the term in the statute? The subject of the statute was, said the court, the destruction of merchant ships and cargoes on the high seas by Confederate cruisers. In this relation certain facts and circumstances should be considered. The court then proceeded as follows:

"Within the marine league from a neutral shore the property of citizens of the United States was under the protection of the neutral government, and not legally subject to capture by belligerent cruisers, and within the marine league of the shore of the United States and on its interior waters it was under the protection of the guns, shore batteries, harbor defenses, and land forces of the United States, and consequently less liable to capture by belligerent ships of the public enemy; and the entrance of merchant ships for the purpose of trade into the harbors and on the interior

waters of the Confederate States had been prohibited by the United States before the sailing of any Confederate cruiser. Hence the presence of a merchant ship of the United States within the marine league of the Confederate coast was presumably illegal, being in defiance of the laws of its sovereign.

"From this condition of facts the conclusion may safely be drawn by the court that Congress probably intended to distinguish between the class of sufferers whose property was destroyed within a marine league and also on the interior waters of the United States and of the Confederate States, to exclude them from the beneficial provisions of this statute, and to provide for them, if deemed advisable, by future legislation.

"In this view the language of the statute, 'That the first class shall be for claims directly resulting from damage done on the high seas by Confederate cruisers during the late rebellion, including vessels and cargoes attacked on the high seas, although the loss or damage occurred within four miles of the shore,' is clear and explicit—free from all ambiguity—nothing appearing as surplusage or as redundancy, and nothing in conflict with any other part of the statute. And in this view the enlarging clause 'including vessels and cargoes attacked on the high seas, although the loss or damage occurred within four miles of the shore,' does increase the scope of the beneficial provisions of the act, and is also in harmony with the preceding clause to which it is attached. And, moreover, can be equally applied on neutral as well as on belligerent shores \* \* \*. The court therefore concludes that Congress intended to adopt, for the purposes of this act, as the exterior boundaries of the 'high seas,' a line four miles seaward from the shore. \* \* \* Judgment will therefore be entered in favor of the United States."

**Claims of Insurance  
Companies.**

In certain cases before the court the claimants, as assignees of certain insurance companies, prayed judgment for losses caused by the destruction of vessels and property on the high seas by Confederate cruisers. The companies in question, after having insured the owners of such vessels and property against war risks, and paid the insurance on them, became possessed, by formal contract with the owners, of all the latter's rights and interests in such vessels and property. The government objected to the claims on the ground that the assignees of the companies could not have greater rights than the companies themselves, and that it was not alleged in the petitions that the sum of the companies' losses in respect of their war risks exceeded the sum of their premiums and other gains in respect of such risks. The court held such an allegation to be necessary under section 12 of the act of June 23, 1874, revived by the act of 1882.<sup>1</sup>

**Losses "Directly  
Resulting."**

In a case where damages were claimed for the failure of the sale of a vessel in consequence of the existence of a ransom bond, the court, following the decision of the former court in *Hyneman v. United States*,<sup>2</sup> held that the loss was not one "directly resulting" from damage caused by a Confederate cruiser, and ordered judgment to be entered for the United States.<sup>3</sup>

<sup>1</sup> *Lane et al., assignees of the Atlantic Mutual Insurance Company, v. United States*, Nos. 4919 and 4920, class 1, June 17, 1884. This decision was affirmed in the case of the *Pacific Mutual Insurance Co. v. United States*, No. 3805, class 2; and in the case of the *Union Mutual Marine Ins. Co. v. United States*, No. 3859, class 2.

<sup>2</sup> *Davis's Report*, 45.

<sup>3</sup> *Griswold v. United States*, No. 4888, class 1.

**The Bankruptcy  
Question.**

An important question, much controverted before the court, was whether under the acts of Congress applicable to the court a claim either of the first or the second class passed by an assignment in bankruptcy or insolvency or by a general assignment for the benefit of creditors, or whether the assignor was still to be regarded as the legal owner of the claim. This question arose chiefly under section 14 of the national bankrupt act of March 2, 1867,<sup>1</sup> though one of the cases in which it was discussed was that of a voluntary assignment for the benefit of creditors, under the laws of the State of New York, of "all the estate, real and personal, of every name and description and wheresoever situated, now owned and possessed by the assignor or in which he is in any way interested." The court held that the claims passed to the assignees even where the bankruptcy or assignment occurred prior to the passage of the act of 1882. After citing various cases to show the extensive operation of bankrupt assignments<sup>2</sup> and adverting to the ruling of the first court that claims under the act of June 23, 1874, passed under an assignment in bankruptcy, the court argued that the act of 1882 could not "properly be regarded as creating a bounty" for the claimants.<sup>3</sup> Other courts have taken a different view of this question, holding that the payment of war-premium and exculpated-cruiser claims under the act of 1882 was a mere gratuity.<sup>4</sup>

**Nonbankrupt Assign-  
ments.**

The decision that war-premium and exculpated-cruiser claims passed by an assignment in bankruptcy or insolvency, or by a general assignment for the benefit of creditors, naturally raised the question whether individual transfers of such "claims" contravened the act of Congress of February 26, 1853,<sup>5</sup> making "absolutely null and void" all assignments and transfers of "any claim upon the United States" prior to the issuance of a warrant for its payment. It had already been decided by the Supreme Court of the United States that assignments by operation of law did not come within this statute;<sup>6</sup> but it was obvious that mere voluntary transfers, neither bankrupt nor insolvent, nor for the general benefit of creditors,<sup>7</sup> were embraced by it, if the claims in question could be considered as claims upon the United States. As to transfers after the passage of the act of 1882, the question seemed clear enough, and it was held in the Stevens case that they were invalid.<sup>8</sup> But as to transfers prior to that

<sup>1</sup> Revised Statutes of the United States, sec. 5046.

<sup>2</sup> *Comegys v. Vasse*, 1 Peters, 193; *United States v. Hunter*, 5 Mason, 62; *Milnor v. Metz*, 16 Peters, 22; *Phelps v. McDonald*, 99 U. S. 298; *Leonard v. Nye*, 125 Mass. 455. The case of *Comegys v. Vasse*, which was cited as the leading case, affords no necessary support to the court's view. In that case the right which was held to have passed was the right to compensation from Spain for the unlawful seizure and confiscation of a vessel.

<sup>3</sup> Opinion on the Bankruptcy Question, March 3, 1884, by French, J.

<sup>4</sup> *Kingsbury v. Matlocks*, 81 Me. 310, 17 Atl. 126; *In re Cooley*, 6 Dem. Sur. 77.

<sup>5</sup> Revised Statutes of the United States, sec. 3477.

<sup>6</sup> *Erwin v. United States*, 97 U. S. 392.

<sup>7</sup> *Butler v. Goreley*, 146 U. S. 303.

<sup>8</sup> *Stevens v. United States*, No. 265, class 2; *Manning v. Leighton* (Vt.), 26 Atl. 258.

time, it seems to have been supposed that the court held, in the same case, that they were not within the act of 1853 and were valid. This supposed ruling was pressed upon the attention of the court in the argument of the bankruptcy question, the contention being that unless the claims were substantial enough to come within the act of 1853 they did not pass by an assignment in bankruptcy or insolvency. With respect to this contention, the court, in its opinion on the bankruptcy question, in which it maintained the view that the claims passed under bankrupt or insolvent assignments even prior to 1882, said: "This view is not, in our judgment, inconsistent with that taken in the Stevens case, where it was held that transfers and assignments made to individuals prior to the passage of the act of 1882 did not come within the prohibition contained in the act of February 28, 1853." In this statement of what it had previously decided the court seems to have lost sight of the fact, which it noticed in its opinion in the Stevens case, that the only assignment in that case made prior to 1882 was made in 1867, four years before the Treaty of Washington, when the *Alabama* claims, whatever they may have included, existed only as claims against Great Britain, and therefore clearly were not subject to the inhibition of the act of 1853.

In consequence of the decision that the claims against Verification of Claims. the Geneva-award fund under the acts of 1874 and 1882 passed to assignees in bankruptcy appointed after the losses occurred, such assignees were permitted, where claims had been filed in the names of the bankrupts, to be substituted for them on motion, though the application for such substitution was made after the time prescribed for filing claims had expired. In such cases the court considered the claimants in the matter of filing petitions as the agents of the assignees, who were treated as having ratified their acts.<sup>1</sup> But the court refused to substitute the assignee of a person who had become individually bankrupt for the same person claiming as surviving partner of a firm which was not mentioned in the bankruptcy proceedings.<sup>2</sup>

Where one person had paid war premiums for another the court prescribed the following mode for filing claims:

"Where the payment of premiums for war risks was made by one party, in his own name, for the benefit of others, and the amount of such payments has been refunded to him in whole or in part by those for whom it was paid, the petition may be made and sworn to in the name of the party so paying the premiums, or, in case of his decease, by his personal representatives, for and on behalf of those for whose benefit said premiums were paid, and separate judgments shall be entered in favor of the parties beneficially interested.

"In such petitions, it shall be necessary to set out the names and residences of the parties having the beneficial interest, the amounts of their respective interests, and all other facts regarding them required of a petitioner under Rule III. of this court."<sup>3</sup>

<sup>1</sup> *Bevans v. United States*, Nos. 626, 729, 730, class 2. In such cases the court undertook to protect the interests of the attorneys of the bankrupt claimants up to the time of the allowance of the motions, by fixing the amount the attorneys should receive, in accordance with the rule of the first court, where the parties in interest were unable to agree.

<sup>2</sup> *Goodridge v. United States*, No. 4665, class 2.

<sup>3</sup> *Swift v. United States*, No. 141.

On the 15th of July 1885 the court decided that, where the claimant's administrator received his appointment outside of the United States, ancillary administration must be taken out in the District of Columbia, and that the ancillary administrator only could maintain the claim of the decedent and take judgment thereon; and it was also held that a judgment could not be rendered in favor of a guardian.<sup>1</sup>

The court invariably required the person making a claim for another to show some authority from the latter. In a certain case one James C. Jewett, styling himself administrator of the estate of William Henderson and fifteen other persons, said to be deceased seamen, who had suffered losses on the high seas by the acts of Confederate cruisers, on January 13, 1883, filed an original petition praying judgment for upward of \$10,000 for such losses. The time for the filing of claims expired next day. On the 9th of October 1884 he filed a so-called amended petition as administrator, praying judgment on his original petition. His reason for this proceeding seems to have been that in his original petition he nakedly assumed the title of administrator, and that it was not till September 7, 1883, that he was actually invested with an administrator's authority. On these facts counsel for the United States asked for judgment. Counsel for the petitioner resisted the motion on the ground that the authority as administrator when actually obtained related back to the filing of the original petition; and in support of this contention he cited the rulings of the first court and the words of the act of 1882 permitting a petition to be "verified by or in behalf of claimant." The court, speaking through Judge Harlan, reviewed the rulings of the first court, some of which were adverse to the claimant's contention. In the cases of *Miguel Ignacio v. United States* and *Abraham Osborn v. United States* the petitions were dismissed for want of authority on the part of the person presenting them.<sup>2</sup> In *William O. Smith v. United States* an administrator appointed in the District of Columbia was permitted to be substituted for a foreign administrator; but in this case it might have been held that the requirements of the statute had been substantially complied with. In the case of "*Robert Montgomery v. United States* and other cases," referred to by the reporter of the first court as having reversed the previous decisions, there was, said Judge Harlan, no expression coming from the court itself implying that it intended to be so understood. It was probable that the action of the court in the case of *Montgomery* rested on the "peculiar circumstances" which the reporter referred to but did not disclose. Continuing, Judge Harlan said:

"No doubt that court felt justified, as does this court, in giving a generous construction of the statutes in favor of *bona fide* claimants. Of this character are the decisions of this court sustaining the right of ships' husbands to verify and file claims of the second class, including war premiums paid for their co-owners, and of factors and commission merchants, embracing war premiums paid for consignees and other customers, and also decisions permitting assignees in bankruptcy to come in by amendment of petitions erroneously verified and filed by the bankrupts, and prosecute the same to final judgment in the name of said assignees, which decisions counsel for claimant at bar cites in support, as he thinks, of his contention in this case.

<sup>1</sup> *Manning v. Leighton* (Vt.), 26 Atl. 258, 259.

<sup>2</sup> *Supra*, p. 2393.

"In this class of cases, first above mentioned, this court, after elaborate argument of counsel and mature consideration, decided that the general authority conferred upon ships' husbands by their co-owners, and on factors by their customers, to transact this business for them, and to care for and preserve their respective interests in the premises, was sufficient to enable such agent, under the provisions of the statute, to legally verify and file these claims, and that when so verified and filed in due time, the several parties in interest, known in this court as 'beneficiaries,' might subsequently ratify this act of their agent, prove their claims as well as their loyalty, and recover judgments in their own names. It is obvious that the court, in these decisions, adhered to the principle that the authority of the *bona fide* owner of each claim is necessary to enable his agent to verify and file his claim. The only question decided in those cases, relating to the point raised by counsel in the case at bar, was as to the sufficiency of the testimony establishing the authority of such agents. The court held it to be sufficient.

"The decisions relating to the question as to the right of a bankrupt, or of his assignee in bankruptcy, to appear as a claimant in this court, are anomalous. The question whether or not these claims were a part of a bankrupt's estate, and passed or did not pass to the assignee, had not then been settled by the published opinions of the courts of the United States. The statute was absolutely silent on the subject. The most able and learned counsel at this bar were divided in opinion. Hence many of these claims were brought in the name of the bankrupt, and perhaps as many in the name of the assignee, and some of them by both, as conflicting claimants for the same claim. After listening to the most exhaustive argument of learned counsel *pro* and *con*, and after careful and mature consideration, the court came to the conclusion that these claims were property in such a sense as made them a part of a bankrupt's estate, and consequently that they passed under a general assignment to the custody of the assignee for the benefit of creditors. At the date of this decision the six months' time had expired; and therefore all of these claims which had been verified and filed by the bankrupt, if not susceptible of amendment, would have to be dismissed, under the requirements of the statute, as having been voluntarily waived by their owners. But, in fact, there had been no intentional abandonment. Due diligence was manifest. They were the original owners of these claims. They believed themselves to be at the time the legal owners. Their condition resulted from the uncertainty of the law governing the question of title, which at that date had not been declared by any competent court.

"Under these 'peculiar circumstances' justice clearly demanded that the legal representatives of the bankrupt's estate, of which such claims, under this decision, constituted a part, should be permitted to come forward and ratify the verification and filing by the bankrupt, and prosecute them in their own name to final judgment. The court has permitted this to be done, believing such verification and filing by the bankrupt a more rational satisfaction of every conceivable reason of the statute than by the assignee in bankruptcy. As a notice to the government of the existence of the claim, it would be equally satisfactory. The bankrupt, being the original owner of the property destroyed, would presumably have more reliable knowledge as to the verity of the loss and the value of the property than the assignee in bankruptcy; and, up to the date of the assignment, as to indemnity, returns, dividends, set-offs or prior assignments. And as to the question of his own loyalty, he is the only person who could swear or affirm with absolute certainty; and under the decisions of the court, the only person whose loyalty it is necessary to prove in the collection of a bankrupt's claims by an assignee.

"The court will not assume that there were not 'peculiar circumstances' developed in the case of *Robert Montgomery v. The United States*, and others, decided by the former court, equally potential and conclusive, justifying a departure from the verbal requirements of the statute, and yet bringing these decisions fully within the reasons of the law, as interpreted and applied by this court. But if this were not so, and it could be shown that this decision of the former court was in complete accord with the contention of the complainant's counsel, entertaining the greatest respect for

the legal learning and judicial acumen of its several members, this court does not see its way clear to follow such a precedent in deciding the case at bar.

"Regarding this statute as being beneficent in character, and intended by Congress to be construed generously in the interest of claimants, this court had given a liberal application to the principle of law requiring authority derived from the owner of a claim to commence a suit by another in his behalf; recognizing the legality of the verification and filing in all cases in which such authority could be reasonably presumed, although not formally bestowed, provided that any existing doubt should be removed by subsequent ratification; as when verified and filed by a ship's husband in behalf of his co-owners; by a factor in behalf of his consignees and other customers; by a partner in behalf of other members of the firm; by a son in behalf of his father; by a wife in behalf of her husband; or by an intimate friend in behalf of his comrade.

"But in judicial proceedings the most generous and liberal construction should have a reasonable limit. And in the case under consideration the person who verified and filed the petition was at the time totally destitute of authority derived from the owners of these claims, either expressly given or derived from his personal relations with them during their lifetime. He had never been their agent or attorney. The nearest approach to such relation was his alleged employment in 1877 by their attorney, one Edgar F. Brown, to assist him in preparing sailors' claims, which may have included the claims of these parties; which employment was, of course, terminated by Brown's death, which occurred soon thereafter. It does not appear that Jewett was at the time, or ever had been, associated with any one of them in business of any character, or that he was a kinsman or intimate friend, or that he had seen any one of them since 1877, or that he knew any one of them personally, or that he had any special knowledge of their identity and of the verity of their several claims, except that derived from memoranda on loose sheets of paper found, as he alleges, in Mr. Brown's office after his death and transferred to him—by whom it is not revealed—and used by him in preparing this petition. Hence, if these parties had been living, his authority derived from them to verify and file this petition in their behalf would have been a naked assumption, without legal sanction or the least moral support; and as they were all dead at the time, and he had not been appointed administrator of their estates, he was equally destitute of authority derived from a competent court; and as it does not appear that any one of these persons left families or kindred or creditors in this country or elsewhere to be benefited by a judgment in his favor, this court does not feel impelled to give extraordinary latitude to the phraseology of the statute and the universally recognized principles of law, which can not be demanded in the interest of justice.

It was held by the first court<sup>1</sup> that delay in the reception of a petition caused by an accident to the United States mails should not be imputed to the claimant. In a case before the second court a petition was deposited in the mails at Glasgow, Scotland, January 2, 1883, addressed to an attorney at New York, by whom it was transmitted to Washington on January 17. It was deposited in the office of the clerk of the court on January 20. The time for filing claims under the act of 1882 expired January 14, 1883. It was held that the petition could not be received. The court said that in the case under the act of 1874 the petition was deposited in the United States mail, addressed to the clerk of the court, in ample season to have reached its destination within the prescribed time in the ordinary course of the mails. It was therefore in a sense in the custody of the government. In the case under consideration the petition was committed to a foreign mail, and was not addressed to the clerk or to any other officer of the court;

<sup>1</sup> *Geohagan v. United States*, No. 1380.

and there was, the court added, "some uncertainty. to say the least, whether in due course of mail this petition, posted at Glasgow, January 2, would be delivered in Washington by 12 m. on the 14th."<sup>1</sup>

July 24, 1885, the court made an order directing Jerome F. Manning, one of the attorneys admitted to practice before it, to show cause at 10 o'clock the next morning why his name should not be stricken from the rolls. The ground of this action, as stated in the order, was that Manning, "being uninvited and refused admittance to its consultation room, July 23, 1885, then occupied by the court sitting in chambers engaged in the transaction of its official duties, nevertheless forced his way into said room, and interrupted the court in the prosecution of its official work by unseemly threats, then and there uttered against one of the judges thereof because of an official opinion delivered from the bench in open court by said judge as the organ of the court in the announcement of a decision in a case pending before it." On July 25, after the order had been read in open court, Manning made a statement disclaiming any intention of interrupting or insulting the court, and asked for a postponement of the hearing till the 27th. The court declined to postpone the hearing beyond 4 o'clock in the afternoon of the 25th, when Manning appeared with counsel, who read and filed affidavits and addressed the court in his defense. On the 29th of July the court, after signing a statement as to what took place on the 23d, made an order prohibiting Manning from exercising the functions of an attorney or counselor before it, and authorized the clerk "to substitute the name of any attorney of this court in place of said Jerome F. Manning in any case, upon the receipt of the request in writing from the claimant therein, or from his legal representatives to that effect." In the following autumn a motion was made for Manning's restoration. The court replied that after his disbarment he had embodied in a circular to his clients and in an article published in the *Lowell (Mass.) Courier* of August 1, 1885, a copy of which was received through the mails by each member of the court, statements which the court described as "grossly abusive" and "in contempt of its authority;" and the court refused to rescind its order except on condition that Manning retract his charges on oath and apologize for them, which he refused to do.

By the act of 1882 the Secretary of State was required, after receiving the list of the court's judgments, to transmit a certified copy of it to the Secretary of the Treasury, in order that they might be paid; but owing to the impossibility of making such a copy at once the original list was provisionally sent to the Treasury, in order that the claimants might not be subjected to any delay.<sup>2</sup> While the matter stood thus Manning filed in the supreme court of the district of Columbia a petition for a writ of mandamus, in which he stated that the judges of the *Alabama Claims Court* had unlawfully caused his name to be erased from the "true and correct list" of judgments, and prayed that the Secretary of State might be

<sup>1</sup> *Guild v. United States*.

<sup>2</sup> The act of June 3, 1884 (23 Stats. at L. 33), requiring the court to report a list of judgments of the first class, expressly authorized the Secretary of State to transmit "the same, or a copy thereof," to the Secretary of the Treasury.



directed to recall the false and misleading record and furnish a true and correct one.<sup>1</sup> Nothing came of this proceeding.<sup>2</sup> Manning also brought suit for damages against Judge French in the courts of Massachusetts; but he failed to recover, it being held that the *Alabama* Claims Court possessed, under the statutes by which it was created, power to make rules for the admission of attorneys to practice before it, and to deprive such attorneys of the privilege of continuing such practice, and that the proceedings against Manning were not in the nature of a proceeding for contempt.<sup>3</sup>

<sup>1</sup> Mr. Bayard, Sec. of State, to Mr. Garland, At. Gen., October 14, 1886, MSS. Dept. of State.

<sup>2</sup> The petition for the writ was filed October 11, 1886, and on November 22 an amended petition was filed. January 7, 1887, Merrick, C. J., directed a decree for the respondent. A motion was made for a rehearing, but on January 14 the petition was dismissed with costs. An appeal bond was filed, but the matter does not appear to have been carried further. No mandate was ever filed. (Mr. Young, clerk of the court, to Mr. Moore, February 8, 1897, MS.)

<sup>3</sup> *Manning v. French*, 149 Mass. 391, 21 N. E. 945. A person named Charles O. Osborn, who had been designated by the court as an expert witness to examine the books and records of sundry insurance companies and individual insurers, was disqualified by the court, and his orders of employment were revoked, upon the discovery that he had addressed a letter to an ex member of Congress offering him a sum of money for his influence to obtain a consular position under the Government of the United States.

The Secretary of State possessed no power to review the judgments of the Court of Commissioners of Alabama Claims. (Mr. Porter, Assistant Secretary, to Mr. Steever, April 16, 1885, MS.)

The Department of State declined to advise the President to recommend to Congress the revision of the judgment of the court in respect of the claims of certain members of Lloyds. (Mr. Bayard, Sec. of State, to Sir Lionel West, August 17, 1886, MS. Notes to the British Legation.)



## APPENDIX II.

### TREATIES RELATING TO ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY.

[Argentine Republic. See Brazil, and Paraguay.]

#### BRAZIL.

*Protocol of a conference held in Rio de Janeiro in the foreign office on the 14th day of March, in the year of our Lord one thousand eight hundred and seventy, between the envoy extraordinary and minister plenipotentiary of the United States and the minister and secretary of state for the marine department in charge of foreign affairs.*

Whereas the Government of the United States have claimed of the government of His Imperial Majesty the Emperor of Brazil the payment of a certain compensation to the owners of the United States whaleship *Canada*, which is alleged by the Government of the United States to be justly due to the said owners by the government of His Imperial Majesty; and whereas the government of His Imperial Majesty deny their liability to make such payment by reason of any of the alleged causes set forth by the Government of the United States; and whereas both parties being animated by a friendly feeling, and each desiring to make an amicable settlement of the said cause of difference, have agreed to refer the same to the arbitration of Edward Thornton, esq., commander of the bath, the envoy extraordinary and minister plenipotentiary of Her Britannic Majesty at Washington: For this purpose it now becomes necessary to place on record certain terms and arrangements, with a view of obtaining a speedy and convenient hearing and determination of the matters to be submitted; and the undersigned, Henry T. Blow, envoy extraordinary and minister plenipotentiary of the United States near the court of His Imperial Majesty, and the Baron de Cotegipe, minister and secretary of state for the marine department in charge of the foreign affairs, being duly authorized by their respective governments, have agreed as follows:

ARTICLE I. The claim of the Government of the United States against the Government of Brazil for compensation to the owners of the United States whaleship *Canada*, and of the cargo thereof, shall be submitted to the arbitration and award of Edward Thornton, esq., commander of the bath, the envoy extraordinary and minister plenipotentiary of Her Britannic Majesty at Washington.

ARTICLE II. The award of the said arbitrator shall be considered as absolutely final and conclusive, and full effect shall be given thereto without any objection, evasion, or delay whatsoever. Such decision shall

be given in writing and dated. It shall be in whatsoever form the arbitrator shall choose to adopt. It shall be delivered to the minister or other public agent of His Imperial Majesty who may be actually in the United States and to the Secretary of State at Washington, and shall be considered as operative from the date of the delivery thereof.

ARTICLE III. The written or printed case of each of the two parties, with the documents, correspondence, and evidence on which each relies in support of the same, shall be laid before the arbitrator at Washington on or before the 1st day of June next, and the arbitrator shall decide the questions so submitted to him upon such case, documents, correspondence, and evidence.

ARTICLE IV. The Secretary of State of the United States and the minister or other public representative of His Imperial Majesty, actually in the United States, shall be considered as the agents of their respective governments, to whom the arbitrator shall address notices and whose acts shall bind their respective governments.

ARTICLE V. The arbitrator may employ a clerk for the purposes of the arbitration at such rate of remuneration as he shall think proper. This and all other expenses of the arbitration shall be repaid in two equal portions, one by each of the two parties, as soon as the arbitrator renders an account of the same.

ARTICLE VI. Should the arbitrator decline to render any decision, everything done by virtue of this agreement shall be null and void and each government shall be at liberty to proceed as if no arbitration had been made.

Done at Rio de Janeiro the fourteenth day of March, in the year of our Lord one thousand eight hundred and seventy.

[SEAL.]

HENTY T. BLOW.

[SEAL.]

BARON DE COTEGIPE.

*Treaty between Brazil and the Argentine Republic, signed September 7, 1889, for the arbitration of the question of their boundaries.*

[Translated from the Portuguese.]

His Majesty the Emperor of Brazil and His Excellency the President of the Argentine Republic, desiring to solve as speedily as possible the boundary question pending between the two States, have agreed, without prejudice to the treaty of the 28th of September 1885, to fix a term for the conclusion of the discussion of right, and, in the event of their not succeeding in coming to an understanding, to submit the same question to the arbitration of a friendly government, and as to this end a treaty is necessary, they have appointed their plenipotentiaries, that is to say:

His Majesty the Emperor of Brazil, the Baron de Alencar, a member of his council, his envoy extraordinary and minister plenipotentiary in the Argentine Republic; His Excellency the President of the Argentine Republic, Dr. D. Norberto Quirno Costa, his minister and secretary for the home office and, *ad interim*, for foreign affairs;

Who, after having communicated to each other their full powers, which were found in good and due form, agreed upon the following articles:

ART. 1. The discussion of the right which each of the high contracting parties believes itself to have to the territory in litigation between them

shall be closed within the term of ninety days, reckoned from the conclusion of the survey of the ground in which the sources of the rivers Chapécó or Pequiry-Guaçu and Jangada or Santo Antonio-Guaçu are situated.

Such survey will be understood to have been concluded on the day when the commissions appointed by virtue of the treaty of the 28th of September 1885 shall present to their governments the reports and plans referred to in article 4 of the said treaty.

ART. 2. If the term mentioned in the preceding article should expire without any friendly solution, the question shall be submitted to the arbitration of the President of the United States of America, to whom the high contracting parties shall apply within the sixty following days, requesting him to accept that function.

ART. 3. If the President of the United States of America should refuse, the high contracting parties shall select within sixty days of the refusal another arbitrator, either in Europe or America, and in the event of any other refusal they shall proceed in the same manner.

ART. 4. The invitation being accepted, each of the high contracting parties will within twelve months, reckoned from the date of the receipt of the respective communication, present to the arbitrator a statement, accompanied by all documents and titles tending to the defence of its right. This being done, no further addition can be made except at the request of the arbitrator, who will have the right to order all necessary information.

ART. 5. The frontier shall be constituted by the rivers which Brazil or the Argentine Republic have designated, and the arbitrator shall be invited to pronounce in favor of one or the other of the parties as he may consider just after due investigation of the reasons and documents produced.

ART. 6. The award shall be given within a term of twelve months, reckoned from the date of the presentation of the statements, or of the more recent, if they shall not have been presented at the same time by both parties. It shall be definitive and obligatory, and nothing shall be alleged as a reason for hindering its fulfillment.

ART. 7. The present treaty shall be ratified and the ratifications shall be exchanged at the city of Rio de Janeiro within the shortest possible term.

In witness whereof the plenipotentiaries of the Empire of Brazil and of the Argentine Republic sign the said treaty and set their seals thereto at the city of Buenos Ayres on the 7th day of the month of September 1889.

[L. S.]

BARAO DE ALENCAR.

[L. S.]

N. QUIRNO COSTA.

#### CHILE.

*Convention concerning the submission to arbitration of the Macedonian claims.*

[Concluded November 10, 1858; ratifications exchanged at Santiago de Chile October 15, 1859; proclaimed December 22, 1859.]

The Government of the United States of America and the Government of the Republic of Chile desiring to settle amicably the claim made by the former upon the latter for certain citizens of the United States of

America, who claim to be the rightful owners of the silver, in coin and in bars, forcibly taken from the possession of Capt. Eliphalet Smith, a citizen of the United States of America, in the valley of Sitana, in the territory of the former Vice-Royalty of Peru, in the year 1821, by order of Lord Cochrane, at the time Vice-Admiral of the Chilean squadron, have agreed, the former to name John Bigler, Envoy Extraordinary and Minister Plenipotentiary of the United States of America, and the latter Don Geronimo Urmeneta, Minister of State in the Department of the Interior and of Foreign Relations, in the name and in behalf of their respective Governments, to examine said claim and to agree upon terms of arrangement just and honorable to both Governments.

The aforesaid Plenipotentiaries, after having exchanged their full powers, and found them in due and good form, sincerely desiring to preserve intact and strengthen the friendly relations which happily exist between their respective Governments, and to remove all cause of difference which might weaken or change them, have agreed, in the name of the Government which each represents, to submit to the arbitration of His Majesty the King of Belgium, the pending question between them, respecting the legality or illegality of the above referred to capture of silver in coin and in bars, made on the ninth day of May, 1821, by order of Lord Cochrane, Vice-Admiral of the Chilean squadron, in the valley of Sitana, in the territory of the former Vice-Royalty of Peru, the proceeds of sales of merchandise imported into that country in the brig *Macedonian*, belonging to the merchant marine of the United States of America.

Therefore the above-named Ministers agree to name His Majesty the King of Belgium as arbiter, to decide with full powers and proceedings *ex aequo et bono*, on the following points:

First. Is, or is not, the claim which the Government of the United States of America makes upon that of Chile, on account of the capture of the silver mentioned in the preamble of this convention, just in whole or in part?

Second. If it be just in whole or in part, what amount is the Government of Chile to allow and pay to the Government of the United States of America, as indemnity for the capture?

Third. Is the Government of Chile, in addition to the capital, to allow interest thereon; and if so, at what rate and from what date is interest to be paid?

The contracting parties further agree that his Majesty the King of Belgium shall decide the foregoing questions upon the correspondence which has passed between the representatives of the two Governments at Washington and at Santiago, and the documents and other proofs produced during the controversy on the subject of this capture, and upon a memorial or argument thereon to be presented by each.

Each party to furnish the arbiter with a copy of the correspondence and documents above referred to, or so much thereof as it desires to present, as well as with its said memorial, within one year at furthest from the date at which they may respectively be notified of the acceptance of the arbiter.

Each party to furnish the other with a list of the papers to be presented by it to the arbiter, three months in advance of such presentation.

And if either party fail to present a copy of such papers, or its memorial, to the arbiter, within the year aforesaid, the arbiter may make his decision upon what shall have been submitted to him within that time.

The contracting parties further agree that the exception of prescription, raised in the course of the controversy, and which has been a subject of discussion between their respective Governments, shall not be considered by the arbiter in his decision, since they agree to withdraw it and exclude it from the present question.

Each of the Governments represented by the contracting parties is authorized to ask and obtain the acceptance of the arbiter; and both promise and bind themselves in the most solemn manner to acquiesce in and comply with his decision, nor at any time thereafter to raise any question, directly or indirectly, connected with the subject-matter of this arbitration.

This convention to be ratified by the Governments of the respective contracting parties, and the ratifications to be exchanged within twelve months from this date, or sooner, if possible, in the city of Santiago.

In testimony whereof the contracting parties have signed and sealed this agreement in duplicate, in the English and Spanish languages, in Santiago, the tenth day of the month of November, in the year of our Lord one thousand eight hundred and fifty-eight.

[SEAL.]

JOHN BIGLER,  
*Envoy Extraordinary and Minister Plenipotentiary  
of the United States of America.*

[SEAL.]

GERONIMO URMENETA,  
*Plenipotenciario ad hoc.*

*Convention for the settlement of claims.*

[Signed at Santiago August 7, 1892; ratifications exchanged at Washington, January 26, 1893; proclaimed January 28, 1893.]

The United States of America and the Republic of Chile, animated by the desire to settle and adjust amicably the claims made by the citizens of either country against the government of the other, growing out of acts committed by the civil or military authorities of either country, have agreed to make arrangements for that purpose, by means of a Convention, and have named as their Plenipotentiaries to confer and agree thereupon as follows:

The President of the United States of America, Patrick Egan, Envoy Extraordinary and Minister Plenipotentiary of the United States at Santiago, and the President of the Republic of Chile, Isidoro Errázuriz, Minister of Foreign Relations of Chile;

Who, after having communicated to each other their respective full powers, found in good and true form, have agreed upon the following articles:—

ARTICLE I. All claims on the part of corporations, companies or private individuals, citizens of the United States, upon the Government of Chile, arising out of acts committed against the persons or property of citizens of the United States not in the service of the enemies of Chile, or voluntarily giving aid and comfort to the same, by the civil or military authorities of Chile; and on the other hand, all claims on the part of corporations,

companies or private individuals, citizens of Chile, upon the Government of the United States, arising out of acts committed against the persons or property of citizens of Chile, not in the service of the enemies of the United States, or voluntarily giving aid and comfort to the same, by the civil or military authorities of the Government of the United States, shall be referred to three Commissioners, one of whom shall be named by the President of the United States, and one by the President of the Republic of Chile, and the third to be selected by mutual accord between the President of the United States and the President of Chile. In case the President of the United States and the President of Chile shall not agree within three months from the exchange of the ratifications of this Convention to nominate such third Commissioner then said nomination of said third Commissioner shall be made by the President of the Swiss Confederation.

ARTICLE II. The said Commission, thus constituted, shall be competent and obliged to examine and decide upon all claims of the aforesaid character presented to them by the citizens of either country.

ARTICLE III. In case of the death, prolonged absence or incapacity to serve of one of the said Commissioners, or in the event of one Commissioner omitting, or declining, or ceasing to act as such, then the President of the United States, or the President of the Republic of Chile, or the President of the Swiss Confederation, as the case may be, shall forthwith proceed to fill the vacancy so occasioned by naming another Commissioner within three months from the occurrence of the vacancy.

ARTICLE IV. The Commissioners named as hereinbefore provided shall meet in the City of Washington at the earliest convenient time within six months after the exchange of ratifications of this Convention, and shall, as their first act in so meeting, make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment and according to public law, justice and equity, without fear, favor or affection, all claims within the description and true meaning of Articles I and II., which shall be laid before them on the part of the Governments of the United States and of Chile respectively; and such declaration shall be entered on the record of their proceedings; Provided, however, that the concurrent judgment of any two Commissioners shall be adequate for every intermediate decision arising in the execution of their duty and for every final award.

ARTICLE V. The Commissioners shall, without delay, after the organization of the Commission, proceed to examine and determine the claims specified in the preceding articles, and notice shall be given to the respective Governments of the day of their organization and readiness to proceed to the transaction of the business of the Commission. They shall investigate and decide said claims in such order and in such manner as they may think proper, but upon such evidence or information only as shall be furnished by or on behalf of the respective Governments. They shall be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of the respective Governments in support of, or in answer to, any claim, and to hear, if required, one person on each side whom it shall be competent for each Government to name as its Counsel or Agent to present and support claims on its behalf, on each and every separate claim. Each Government shall furnish at the



request of the Commissioners, or of any two of them, the papers in its possession which may be important to the just determination of any of the claims laid before the Commission.

ARTICLE VI. The concurring decisions of the Commissioners, or of any two of them, shall be conclusive and final. Said decisions shall in every case be given upon each individual claim, in writing, stating in the event of a pecuniary award being made, the amount or equivalent value of the same in gold coin of the United States; and in the event of interest being allowed on such award, the rate thereof and the period for which it is to be computed shall be fixed, which period shall not extend beyond the close of the Commission; and said decision shall be signed by the Commissioners concurring therein.

ARTICLE VII. The High Contracting Parties hereby engage to consider the decision of the Commissioners, or of any two of them, as absolutely final and conclusive upon each claim decided upon by them, and to give full effect to such decisions without any objections, evasions, or delay whatever.

ARTICLE VIII. Every claim shall be presented to the Commissioners within a period of two months reckoned from the day of their first meeting for business, after notice to the respective Governments as prescribed in Article V of this Convention. Nevertheless, where reasons for delay shall be established to the satisfaction of the Commissioners, or of any two of them, the period for presenting the claim may be extended by them to any time not exceeding two months longer.

The Commissioners shall be bound to examine and decide upon every claim within six months from the day of their first meeting for business as aforesaid; which period shall not be extended except only in case of the proceedings of the Commission shall be interrupted by the death, incapacity, retirement or cessation of the functions of any one of the Commissioners, in which event the period of six months herein prescribed shall not be held to include the time during which such interruption may actually exist.

It shall be competent in each case for the said Commissioners to decide whether any claim has, or has not, been duly made, preferred, and laid before them, either wholly, or to any and what extent, according to the true intent and meaning of this Convention.

ARTICLE IX. All sums of money which may be awarded by the Commissioners as aforesaid, shall be paid by the one Government to the other, as the case may be, at the capital of the Government to receive such payment, within six months after the date of the final award, without interest, and without any deduction save as specified in Article X.

ARTICLE X. The Commissioners shall keep an accurate record and correct minutes or notes of all their proceedings, with the dates thereof; and the Governments of the United States and of Chile may each appoint and employ a Secretary versed in the languages of both countries, and the Commissioners may appoint any other necessary officer or officers to assist them in the transaction of the business which may come before them.

Each Government shall pay its own Commissioner, Secretary and Agent or Counsel, and at the same or equivalent rates of compensation, as near as may be, for like officers on the one side as on the other. All other

expenses, including the compensation of the third Commissioner, which latter shall be equal or equivalent to that of the other Commissioners shall be defrayed by the two Governments in equal moieties.

The whole expenses of the Commission, including contingent expenses, shall be defrayed by a ratable deduction on the amount of the sums awarded by the Commissioners, provided always that such deduction shall not exceed the rate of five per centum on the sum so awarded. If the whole expenses shall exceed this rate, then the excess of expense shall be defrayed jointly by the two Governments in equal moieties.

ARTICLE XI. The High Contracting Parties agree to consider the result of the proceedings of the Commission provided for by this Convention as a full, perfect and final settlement of any and every claim upon either Government within the description and true meaning of Articles I and II; and that every such claim, whether or not the same may have been presented to the notice of, made, preferred or laid before the said Commission, shall, from and after the conclusion of the proceedings of the said Commission, be treated and considered as finally settled, concluded and barred.

ARTICLE XII. The present Convention shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof and by the President of the Republic of Chile, with the consent and approbation of the Congress of the same, and the ratifications shall be exchanged at Washington, at as early a day as may be possible within six months from the date hereof.

In testimony whereof the respective Plenipotentiaries have signed the present Convention, in the English and Spanish languages, in duplicate, and hereunto affixed their respective seals.

Done at the city of Santiago the seventh day of August, in the year of our Lord one thousand eight hundred and ninety-two.

[SEAL.]

PATRICK EGAN.

[SEAL.]

ISIDORO ERRÁZURIZ.

#### COLOMBIA.

#### *Convention concerning the adjustment of claims against the Republic of New Granada.*

[Concluded September 10, 1857; ratification exchanged at Washington, November 5, 1860; proclaimed November 8, 1860.]

The United States of America and the Republic of New Granada, desiring to adjust the claims of citizens of said States against New Granada, and to cement the good understanding which happily subsists between the two Republics, have, for that purpose, appointed and conferred full powers, respectively, to wit:

The President of the United States upon Lewis Cass, Secretary of State of the United States, and the President of New Granada upon General Pedro A. Herran, Envoy Extraordinary and Minister Plenipotentiary of that Republic in the United States;

Who, after exchanging their full powers, which were found in good and proper form, have agreed to the following articles:

ARTICLE I. All claims on the part of corporations, companies or individuals, citizens of the United States, upon the Government of New Granada, which shall have been presented prior to the first day of September, 1859,

either to the Department of State at Washington, or to the minister of the United States at Bogota, and especially those for damages which were caused by the riot at Panama on the fifteenth of April, 1856, for which the said Government of New Granada acknowledges its liability, arising out of its privilege and obligation to preserve peace and good order along the transit route, shall be referred to a Board of Commissioners, consisting of two members, one of whom shall be appointed by the Government of the United States and one by the Government of New Granada. In case of the death, absence or incapacity of either Commissioner, or in the event of either Commissioner omitting or ceasing to act, the Government of the United States, or that of New Granada, respectively, or the Minister of the latter in the United States, acting by its direction, shall forthwith proceed to fill the vacancy thus occasioned.

The Commissioners so named shall meet in the city of Washington within ninety days from the exchange of the ratifications of this convention, and, before proceeding to business, shall make and subscribe a solemn oath that they will carefully examine and impartially decide, according to justice and equity, upon all the claims laid before them, under the provisions of this convention, by the Government of the United States. And such oath shall be entered on the record of their proceedings.

The Commissioners shall, then, proceed to name an Arbitrator or Umpire, to decide upon any case or cases on which they may differ in opinion. And if they cannot agree in the selection, the Umpire shall be appointed by the Minister of Prussia to the United States, whom the two high contracting parties shall invite to make such appointment, and whose selection shall be conclusive on both parties.

ARTICLE II. The Arbitrator being appointed, the Commissioners shall proceed to examine and determine the claims which may be presented to them, under the provisions of this convention, by the Government of the United States, together with the evidence submitted in support of them, and shall hear, if required, one person in behalf of each Government on every separate claim. Each Government shall furnish, upon request of either of the commissioners, such papers in its possession as the Commissioners may deem important to the just determination of any claims presented to them. In cases where they agree to award an indemnity, they shall determine the amount to be paid, having due regard, in claims which have grown out of the riot of Panama of April 15, 1856, to damages suffered through death, wounds, robberies or destruction of property. In cases where they cannot agree, the subjects of difference shall be referred to the Umpire, before whom each of the Commissioners may be heard, and whose decision shall be final.

ARTICLE III. The Commissioners shall issue certificates of the sums to be paid by virtue of their awards to the claimants, and the aggregate amount of said sums shall be paid to the Government of the United States, at Washington, in equal semi-annual payments, the first payment to be made six months from the termination of the Commission, and the whole payment to be completed within eight years from the same date; and each of said sums shall bear interest (also payable semi-annually) at the rate of six per cent. per annum from the day on which the awards, respectively, shall have been decreed. To meet these payments, the Government

of New Granada hereby specially appropriates one-half of the compensation which may accrue to it from the Panama Railroad Company, in lieu of postages, by virtue of the thirtieth article of the contract between the Republic of New Granada and said Company, made April 15, 1850, and approved June 4, 1850, and also one-half of the dividends which it may receive from the net profits of said road, as provided in the fifty-fifth article of the same contract; but if these funds should prove insufficient to make the payments as above stipulated, New Granada will provide other means for that purpose.

ARTICLE IV. The Commission herein provided shall terminate its labors in nine months from and including the day of its organization; shall keep an accurate record of its proceedings, and may appoint a secretary to assist in the transaction of its business.

ARTICLE V. The proceedings of this Commission shall be final and conclusive with respect to all the claims before it, and its awards shall be a full discharge to New Granada of all claims of citizens of the United States against that Republic which may have accrued prior to the signature of this convention.

ARTICLE VI. Each Government shall pay its own Commissioner, but the Umpire, as well as the incidental expenses of the Commission, shall be paid, one-half by the United States, and the other half by New Granada.

ARTICLE VII. The present Convention shall be ratified, and the ratifications exchanged in Washington.

In faith whereof, we, the respective Plenipotentiaries, have signed this convention, and have hereunto affixed our seals.

Done at Washington, this tenth day of September, in the year of our Lord one thousand eight hundred and fifty-seven.

[SEAL.]

LEW. CASS.

[SEAL.]

P. A. HERRAN.

*Convention concerning the adjustment of claims against the United States of Colombia; supplemental to the Convention of September 10, 1857.*

[Concluded February 10, 1864; ratifications exchanged at Washington August 19, 1865; proclaimed August 19, 1865.]

Whereas a Convention for the adjustment of claims was concluded between the United States of America and the Republic of New Granada, in the city of Washington, on the tenth of September 1857, which convention, as afterward amended by the contracting parties, was proclaimed by the President of the United States on the 8th November 1860;

And whereas the Joint Commission organized under the authority conferred by the preceding mentioned convention did fail, by reason of uncontrollable circumstances, to decide all the claims laid before them under its provisions, within the time to which their proceedings were limited by the 4th article thereof;

The United States of America and the United States of Colombia, the latter representing the late Republic of New Granada, are desirous that the time originally fixed for the duration of the commission should be so extended as to admit the examination and adjustment of such claims as were presented to but not settled by the joint commission aforesaid, and to this end have named Plenipotentiaries to agree upon the best mode of accomplishing this object, that is to say: The President of the United

States of America, William H. Seward, Secretary of State of the United States of America, and the President of the United States of Colombia, Señor Manuel Murillo, Envoy Extraordinary and Minister Plenipotentiary of the United States of Colombia;

Who, having exchanged their full powers, have agreed as follows:

ARTICLE I. The high contracting parties agree that the time limited in the convention above referred to for the termination of the commission, shall be extended for a period not exceeding nine months from the exchange of ratifications of this convention, it being agreed that nothing in this article contained shall in any other wise alter the provisions of the convention above referred to; and that the contracting parties shall appoint commissioners anew, and an umpire shall be chosen anew, in the manner and with the duties and powers respectively expressed in the said former convention.

ARTICLE II. The present convention shall be ratified, and the ratifications shall be exchanged at Washington as soon as possible.

In witness whereof the respective Plenipotentiaries have signed the same, and have hereunto affixed their seals.

Done at Washington this tenth day of February, in the year of our Lord one thousand eight hundred and sixty-four.

[SEAL.]

WM. H. SEWARD.

[SEAL.]

M. MURILLO.

*Convention for the settlement of the claim of Cotesworth and Powell, 1872.*

The undersigned, Señor Don Jil Colunjé, Secretary of the Interior and Foreign Relations of the United States of Colombia, and Charles O'Leary, Esq., Her Britannic Majesty's Acting Consul General, in charge of Her Majesty's Legation in Bogotá, being both specially authorized by their respective Governments to enter into an agreement which shall put an end to the claim of Messrs. Cotesworth and Powell, British subjects, against the Government of Colombia, arising out of certain acts connected with the administration of Justice in the city of Baranquilla, State of Bolivar, between the years 1858 and 1860, have agreed upon the following stipulations for that purpose:

ARTICLE 1. The claim of Messrs. Cotesworth and Powell shall be submitted to the arbitration of two commissioners, one to be named by the Government of the United States of Colombia, the other by Her Britannic Majesty's chargé d'affaires in Bogotá, or, in his absence, by the British Acting Consul General in charge of Her Majesty's Legation.

Any vacancy that may arise in the commission, shall be filled in the same manner as the original appointment.

ARTICLE 2. The commissioners, before proceeding to any other business, shall name some third person to act as an umpire, to decide any point on which they may differ in opinion. If they should not be able to agree in regard to the choice of any such person, the appointment shall be made by the person in charge of the French Legation in Bogotá.

ARTICLE 3. The arbitrators shall decide, as a preliminary question, whether the Republic is bound to grant an indemnity to Messrs. Cotesworth and Powell. If that question be decided in the affirmative, they shall fix the amount of the indemnity, both principal and interest.

ARTICLE 4. Any amount which may be allowed by the arbitrators shall be paid in hard cash to the British chargé d'affaires in Bogotá, or, in his absence, to the person in charge of the British Legation, within twelve months from the date of the award.

ARTICLE 5. The arbitrators shall perform the duties of their office in Bogotá, commencing as soon as the present agreement shall have been approved by the Congress of the Union. In arriving at their decisions, they shall hear, if desired, one counsel for each party, and shall duly weigh the proofs which he may adduce.

Done in Bogotá, the 14th of December 1872.

JIL COLUNJE.

CHARLES O'LEARY.

Approved:

The President of the Union,

MANUEL MURILLO.

Ratified by Congress, Law 26, of 1873.

A true copy:

[Seal of H. B. M. Legation.]

ROBERT BUNCH,

H. B. M.'s Minister Resident.

*Convention for the arbitration of the case of the "Montijo."*

AGREEMENT OF ARBITRATION.

The undersigned, to wit, William L. Scruggs, minister resident of the United States of America, and Jacobo Sanchez, secretary of the interior and foreign relations of the United States of Colombia, being especially authorized by their respective governments to submit to the decision of the arbitrators the indemnity-claims made by the Government of the United States against that of Colombia for damages resulting from the seizure and detention of the steamer *Montijo*, within the territory and by certain citizens of Colombia, in April, 1871, have entered into the following agreement:

1. Said claims shall be submitted to arbitrators, one to be appointed by the minister resident of the United States of America, another by the Government of the United States of Colombia, and these two to name an umpire, who shall decide all questions upon which they may be unable to agree. In case the place of either arbitrator or of the umpire shall, from any cause, become vacant, such vacancy shall be filled forthwith in the manner herein provided for the original appointment. If the arbitrators cannot agree in the choice of an umpire, one shall be selected by new commissioners, chosen for and assigned exclusively to this duty.

2. The arbitrators and umpire so named shall meet in Bogota within one month from the date of their appointment, and shall, before proceeding to business, make and subscribe a solemn declaration that they will impartially consider and determine, to the best of their judgment, and according to public law and treaties in force between the two countries, and these present stipulations, the claims herein submitted, and such declaration shall be entered upon the record of their proceedings.

3. The official correspondence and documents relative to the case shall be submitted to the arbitrators; but, before their decision is rendered, the

attorney-general, or lawyer, of the government of Colombia shall be heard, as well as the one designated by the minister-resident of the United States. The expositions of the attorneys will be orally or in writing.

4. The arbitrators shall have jurisdiction of the claims mentioned, and they shall decide, as a primary question, whether the United States of Colombia is obligated to grant indemnification, and if that question should be decided affirmatively, they will fix the amount of indemnification. The award shall be made in writing; and, if indemnity be given, the sum shall be expressed in the legal coin—pesos de ley—of the United States of Colombia, and paid to the minister resident of the United States, or to such person as he may name, within one year from the date of the decision.

5. The expenses of the arbitration, not to exceed fifteen hundred dollars, shall be borne in equal moieties by the two governments.

6. The two governments will accept the award made as final and conclusive, and will give full effect to the same; and the Colombian government shall be forever released from any and all further accountability after the decision of the arbitrators shall have been made and its terms faithfully complied with.

In faith whereof the plenipotentiaries of the two governments have signed and sealed the present agreement, in Bogota, on the 17th day of August, in the year of our Lord one thousand eight hundred and seventy-four.

WILLIAM L. SCRUGGS.

JACOBO SANCHEZ.

PODER EJECUTIVO NACIONAL,  
*Bogota, 17 de Agosto de 1874.*

Aprobado.

J. SANCHEZ,

*el Secretario de lo Interior i Relaciones Exteriores.*

*Protocol for the Arbitration of the Cerruti Claim.*

The Government of the Kingdom of Italy and the Government of the Republic of Colombia, desiring to put an end to the subjects of disagreement between them, growing out of the claims of Sig. Ernesto Cerruti against the Government of Colombia for losses and damages to his property in the State (now Department) of Cauca, in the said Republic, during the political troubles of 1885, and desiring furthermore to make a just disposition of the said claims;

His Excellency Baron Blanc, Minister of Foreign Affairs, of H. M. The King of Italy, on the one part; and Don José Marcelino Hurtado, Envoy Extraordinary and Minister Plenipotentiary of the Republic of Colombia to His Majesty the King of Italy on the other part, acting with due authority from their respective governments, have signed this protocol, subject to the approval of the Congress of Colombia to which it shall be submitted during the present session.

The Government of Italy and the Government of Colombia agree to submit to arbitration the matters and claims above referred to, for the purpose of arriving at a settlement thereof, as between the governments.

To this effect, as soon as this protocol shall have obtained the approval of the Congress of Colombia, the governments of Italy and of Colombia

will join in asking H. E. the President of the United States of America, to be pleased to accept the position of arbitrator in the case, and discharge the duties pertaining thereto, as a friendly act to both governments.

As soon as the arbitrator by his acceptance of the office shall have qualified himself to enter upon his functions, he shall become vested with full power, authority and jurisdiction to do and perform, and to cause to be done and performed all things without any limitation whatsoever, which in his judgment may be necessary or conducive to the attainment, in a fair and equitable manner, of the end and purposes which this agreement is intended to secure.

And he shall thereupon proceed to examine and decide according to the documents and evidence that may be submitted to him by each of the two governments or by the claimant as one of the two parties interested in the suit, and the principles of public Law, First, which, if any, among the said claims of Sig. E. Cerruti against the Government of Colombia be a proper claim or claims for international adjudication; and, Secondly, which, if any of the said claims of Sig. E. Cerruti against the Government of Colombia be a proper claim or claims for adjudication by the territorial Courts of Colombia. And respecting the claim or claims, if any, which in the judgment of the arbitrator shall have the character of, and belong to, the first class of claims above defined, the arbitrator shall proceed to determine and to declare the amount of indemnity, if any, which the claimant Sig. Cerruti be entitled to receive from the Government of Colombia through diplomatic action.

And regarding the claim or claims of Sig. E. Cerruti, if any, which in the judgment of the arbitrator shall possess the character of, and belong to the second class of claims above defined, the arbitrator shall so declare them to be and shall take no further action in the matter of such claim or claims.

The claims to which this protocol has reference shall be presented together with the documents and evidence in their support, to the arbitrator and submitted to him not sooner than six calendar months, nor later than seven calendar months, reckoned from and after the date of acceptance of the office of arbitrator by H. E. the President of the United States of America.

Each of the two parties interested in the suit shall defray the expenses incurred on its individual authority or behalf; but all expenses entailed by the authority, or with the sanction, of the arbitrator for the purpose of conveniently discharging his functions or duties or for the common benefit of both parties interested in the suit, shall be borne equally between them.

The two Governments solemnly bind themselves to abide by the decisions and awards of the arbitrator which shall be final and conclusive and not subject either to discussion or appeal. And they further agree not to reopen negotiations or diplomatic discussions on any point or points which the arbitrator may decide or dispose of, or which he may declare to have already been disposed of in conformity with public Law: Nor upon any claim or claims of Sig. E. Cerruti which the arbitrator may declare to have an internal and territorial character.

In witness whereof, His Excellency Baron Blanc, Minister of Foreign Affairs of His Majesty the King of Italy and Don José Marcelino Hurtado,



Envoy Extraordinary and Minister Plenipotentiary of the Republic of Colombia to His Majesty the King of Italy hereunto affix their signatures at Castellamare Stadia on this the Eighteenth day of August in the year One Thousand eight hundred and Ninety-four.

(Signed) BLANC. [L. S.]

(Signed) J. M. HURTADO. [L. S.]

The Undersigned declare and acknowledge the foregoing to be a correct and faithful English version of the original protocol as drawn and executed in the Italian language.

Date ut supra.

(Signed) J. M. HURTADO.

(Signed) BLANC.

### COSTA RICA.

*Convention concerning the adjustment of claims of citizens of the United States.*

[Concluded July 2, 1860; ratifications exchanged at Washington November 9, 1861; proclaimed November 11, 1861.]

The United States of America and the Republic of Costa Rica, desiring to adjust the claims of citizens of said States against Costa Rica in such a manner as to cement the good understanding and friendly relations now happily subsisting between the two Republics, have resolved to settle such claims by means of a convention; and, for that purpose, appointed and conferred full powers, respectively, to wit:

The President of the United States, on Alexander Dimitry, Minister Resident of said United States in the Republic of Costa Rica, and his Excellency the Constitutional President of said Republic of Costa Rica, on Manuel José Carazo and Francisco Maria Yglesias; who, upon an exchange of their plenary powers, which were found in good and proper form, have agreed to the following articles:

ARTICLE I. It is agreed that all claims of citizens of the United States, upon the Government of Costa Rica, arising from injuries to their persons, or damages to their property, under any form whatsoever, through the action of authorities of the Republic of Costa Rica, statements of which, soliciting the interposition of the Government of the United States, have been presented to the Department of State at Washington, or to the diplomatic agents of said United States at San José, of Costa Rica, up to the date of the signature of this Convention, shall, together with the documents in proof, on which they may be founded, be referred to a Board of Commissioners, consisting of two members, who shall be appointed in the following manner: one by the Government of the United States of America, and one by the Government of the Republic of Costa Rica: *Provided, however,* That no claim of any citizen of the United States, who may be proved to have been a belligerent during the occupation of Nicaragua by the troops of Costa Rica, or the exercise of authority, by the latter, within the territory of the former, shall be considered as one proper for the action of the Board of Commissioners herein provided for.

In case of the death, absence, or incapacity of either Commissioner, or in the event of either Commissioner's omitting or ceasing to act, the Government of the United States of America, or that of the Republic of Costa

Rica, respectively, or the minister of the latter, in the United States, acting by its direction, shall forthwith proceed to fill the vacancy thus occasioned.

ARTICLE II. The Commissioners so named shall meet at the city of Washington, within ninety days from the exchange of the ratifications of this convention; and, before proceeding to business, they shall, each of them, exhibit a solemn oath, made and subscribed before a competent authority, that they will carefully examine into, and impartially decide, according to the principles of justice and of equity, and to the stipulations of treaty, upon all the claims laid before them, under the provisions of this Convention, by the Government of the United States, and in accordance with such evidence as shall be submitted to them on the part of said United States and of the Republic of Costa Rica, respectively. And their oath, to such effect, shall be entered upon the record of their proceedings.

Said Commissioners shall then proceed to name an Arbitrator, or Umpire, to decide upon any case or cases concerning which they may disagree, or upon any point or points of difference which may arise in the course of their proceedings. And if they cannot agree in the selection, the Arbitrator or Umpire shall be appointed by the minister of His Majesty the King of the Belgians, to the United States, whom the two high contracting parties shall invite to make such appointment, and whose selection shall be conclusive on both parties.

ARTICLE III. The Arbitrator, or Umpire, being appointed, the Commissioners shall, without delay, proceed to examine and determine the claims which may be presented to them, under the provisions of this Convention, by the Government of the United States, as stated in the preceding article; and they shall hear, if required, one person in behalf of each Government, on every separate claim.

Each Government shall furnish, upon request of either of the commissioners, such papers in its possession as may be deemed important to the just determination of any claims of citizens of the United States, referred to the board, under the provisions of the first article.

In cases, whether touching injuries to the person, limb or life of any said citizens, or damages committed, as stipulated in the first article, against their property, in which the Commissioners may agree to award an indemnity, they shall determine the amount to be paid. In cases in which said Commissioners cannot agree, the points of difference shall be referred to the Arbitrator, or Umpire, before whom each of the Commissioners may be heard, and his decision shall be final.

ARTICLE IV. The commissioners shall issue certificates of the sums to be paid to the claimants, respectively, whether by virtue of the awards agreed to between themselves, or of those made by them, in pursuance of decisions of the Arbitrator, or Umpire; and the aggregate amount of said sums, decreed by the certificates of award made by the Commissioners, in either manner above indicated, and of the sums also accruing from such certificates of award as the Arbitrator, or Umpire, may, under the authority hereinafter conferred by the seventh article, have made and issued, with the rate of interest stipulated in the present article, in favor of any claimant or claimants, shall be paid to the Government of the United States, in the city of Washington, in equal semi-annual instalments. It is, however, hereby agreed, by the contracting parties, that the payment

of the first instalment shall be made eight months from the termination of the labors of the commission; and, after such first payment, the second, and each succeeding one, shall be made semi-annually, counting from the date of the first payment; and the whole payment of such aggregate amount or amounts, shall be perfected within a term of ten years from the termination of said commission; and each of said sums shall bear interest (also payable semi-annually) at the rate of six per cent. per annum, from the day on which the awards, respectively, will have been decreed.

To meet these payments, the Government of the Republic of Costa Rica hereby specially appropriates fifty per cent. of the net proceeds of the revenues arising from the customs of the said Republic; but if such appropriation should prove insufficient to make the payments as above stipulated, the Government of said Republic binds itself to provide other means for that purpose.

ARTICLE V. The Commission herein provided shall terminate its labors in nine months from and including the day of its organization. They shall keep an accurate record of all their proceedings, and they may appoint a secretary, versed in the knowledge of the English and of the Spanish languages, to assist in the transaction of their business. And, for the conduct of such business, they are hereby authorized to make all necessary and lawful rules.

ARTICLE VI. The proceedings of this Commission shall be final and conclusive with respect to all the claims of citizens of the United States, which, having accrued prior to the date of this convention, may be brought before it for adjustment; and the United States agree forever to release the Government of the Republic of Costa Rica from any further accountability for claims which shall be rejected, either by the board of Commissioners, or by the Arbitrator or Umpire aforesaid; or for such as, being allowed by either the Board or the Umpire, the Government of Costa Rica shall have provided for and satisfied in the manner agreed upon in the fourth article.

ARTICLE VII. In the event, however, that upon the termination of the labors of said Commission stipulated for in the fifth article of this convention, any case or cases should be pending before the Umpire, and awaiting his decision, it is hereby understood and agreed by the two contracting parties that, though the Board of Commissioners may, by such limitation, have terminated their action, said Umpire is hereby authorized and empowered to proceed to make his decision or award in such case or cases pending as aforesaid; and, upon his certificate thereof, in each case, transmitted to each of the two Governments, mentioning the amount of indemnity, if such shall have been allowed by him, together with the rate of interest specified by the fourth article, such decision or award shall be taken and held to be binding and conclusive, and it shall work the same effect as though it had been made by both the Commissioners under their own agreement, or by them upon decision of the case or of the cases, respectively, pronounced by the Umpire of said board, during the period prescribed for its sessions: *Provided, however,* That a decision on every case that may be pending at the termination of the labors of the board shall be given by the Umpire within sixty days from their final adjournment; and that, at the expiration of the said sixty days, the authority and power hereby granted to said Umpire shall cease.

ARTICLE VIII. Each Government shall pay its own Commissioner; but the Umpire, as well as the incidental expenses of the commission, including the defrayal of the services of a secretary, who may be appointed under the fifth article, shall be paid one-half by the United States, and the other half by the Republic of Costa Rica.

ARTICLE IX. The present convention shall be approved and ratified by the President of the United States of America, by and with the advice and consent of the Senate of the said States; and by the President of the Republic of Costa Rica, with the consent and approbation of the Supreme Legislative Power of said Republic; and the ratifications shall be exchanged in the city of Washington, within the space of eight months from the date of the signature hereof, or sooner if possible.

In faith whereof, and by virtue of our respective full powers, we, the undersigned, have signed the present convention, in duplicate, and have hereunto affixed our seals.

Done at the city of San José, on the second day of July, in the year one thousand eight hundred and sixty, and in the eighty-fourth year of the independence of the United States of America, and of the independence of Costa Rica the thirty-ninth.

[SEAL.]

ALEX'R DIMITRY.

[SEAL.]

MANUEL J. CARAZO.

[SEAL.]

FRAN'CO M. YGLESIAS.

*Convention between the Governments of Nicaragua and Costa Rica to submit to the arbitration of the Government of the United States the question in regard to the validity of the treaty of April 15, 1858.*

The Governments of the Republics of Nicaragua and Costa Rica desiring to terminate the question debated by them since 1871, to wit:

Whether the treaty, signed by both on the 15th day of April 1858, is or is not valid, have named, respectively, as plenipotentiaries, Señor Don José Antonio Roman, envoy extraordinary and minister plenipotentiary of Nicaragua, near the Government of Guatemala, and Señor Don Ascension Esquivel, envoy extraordinary and minister plenipotentiary of Costa Rica, near the same Government, who having communicated their full powers, found to be in due form, and conferred with each other, with the mediation of the minister for foreign affairs for the Republic of Guatemala, Doctor Don Fernando Cruz, designated to interpose the good offices of his Government, generously offered to the contending parties and by them gratefully accepted, have agreed to the following articles:

(1) The question pending between the contracting Governments, in regard to the validity of the treaty of limits of the 15th of April 1858, shall be submitted to arbitration.

(2) The arbitrator of that question shall be the President of the United States of America. Within sixty days following the exchange of ratifications of the present convention, the contracting Governments shall solicit of the appointed arbitrator his acceptance of the charge.

(3) In the unexpected event that the President of the United States should not be pleased to accept, the parties shall name, as arbitrator, the President of the Republic of Chile, whose acceptance shall be solicited by the contracting Governments within ninety days from the date upon

which the President of the United States may give notice to both Governments, or to their representatives in Washington, of his declination.

(4) If, unfortunately, the President of Chile should also be unable to lend to the parties the eminent service of accepting the charge, both Governments shall come to an agreement for the purpose of electing two other arbitrators within ninety days, counting from the day on which the President of Chile may give notice to both Governments or their representatives, in Santiago, of his non-acceptance.

(5) The proceedings and terms to which the decisions of the arbitrator are limited shall be the following:

Within ninety days, counting from the notification to the parties of the acceptance of the arbitrator, the parties shall present to him their allegations and documents. The arbitrator will communicate to the representative of each Government, within eight days after their presentation, the allegations of the opposing party, in order that the opposing party may be able to answer them within the thirty days following that upon which the same shall have been communicated.

The arbitrator's decision, to be held valid, must be pronounced within six months, counting from the date upon which the term allowed for the answers to the allegations shall have expired, whether the same shall or shall not have been presented.

The arbitrator may delegate his powers, provided that he does not fail to intervene directly in the pronouncement of the final decision.

(6) If the arbitrator's award should determine that the treaty is valid, the same award shall also declare whether Costa Rica has the right of navigation of the river San Juan with vessels of war or of the revenue service. In the same manner he shall decide, in case of the validity of the treaty, upon all the other points of doubtful interpretation which either of the parties may find in the treaty, and shall communicate to the other party within thirty days after the exchange of the ratifications of the present convention.

(7) The decision of the arbitrator, whichever it may be, shall be held as a perfect treaty and binding between the contracting parties. No recourse whatever shall be admitted, and it shall begin to have effect thirty days after it shall have been notified to both Governments or to their representatives.

(8) If the invalidity of the treaty should be declared, both Governments, within one year, counting from the notification of the award of the arbitrator, shall come to an agreement to fix the dividing line between their respective territories. If that agreement should not be possible, they shall, in the following year, enter into a convention to submit the question of boundaries between the two Republics to the decision of a friendly Government.

From the time the treaty shall be declared null, and during the time there may be no agreement between the parties, or no decision given fixing definitely the rights of both countries, the rights established by the treaty of the 15th of April 1858 shall be provisionally respected.

(9) As long as the question as to the validity of the treaty is not decided, the Government of Costa Rica consents to suspend the observance of the decree of the 16th of March last as regards the navigation of the river San Juan by a national vessel.

(10) In case the award of the arbitrators should decide that the treaty of limits is valid, the contracting Governments, within ninety days following that upon which they may be notified of the decision, shall appoint four commissioners, two each, who shall make the corresponding measurements of the dividing line, as provided for by Article 2 of the referred to treaty of 15th April 1858.

These measurements and the corresponding landmarks shall be made within thirty months, counting from the day upon which the commissioners shall be appointed. The commissioners shall have the power to deviate the distance of one mile from the line fixed by the treaty, for the purpose of finding natural limits or others more distinguishable. But this deviation shall be made only when all of the commissioners shall have agreed upon the point or points that are to substitute the line.

(11) This treaty shall be submitted to the approval of the Executive and Congress of each of the contracting Republics, and their ratifications shall be exchanged at Managua or San José de Costa Rica on the 30th of June next, or sooner if possible.

In testimony of which the plenipotentiaries and the minister of foreign affairs of Guatemala have hereunto signed and sealed with their private seals, in the city of Guatemala, this 24th day of December 1886.

ASCENSIÓN ESQUIVEL.  
J. ANTONIO ROMÁN.  
FERNANDO CRUZ.

*Treaty of Limits between Costa Rica and Nicaragua, concluded April 15th, 1858.*

We, Máximo Jerez, Minister Plenipotentiary of the Government of the Republic of Nicaragua, and José María Cañas, Minister Plenipotentiary of the Government of the Republic of Costa Rica, having been entrusted by our respective Governments with the mission of adjusting a treaty of limits between the two Republics, which should put an end to all the differences which have obstructed the perfect understanding and harmony that must prevail among them for their safety and prosperity, and having exchanged our respective powers, which were examined by Hon. Señor Don Pedro R. Negrete, Minister Plenipotentiary of the Government of the Republic of Salvador, exercising the functions of fraternal mediator in these negotiations, who found them to be good and in due form, as we on our part also found good and in due form the powers exhibited by the said Minister, after having discussed with the necessary deliberation all the points in question, with the assistance of the Representative of Salvador who was present, have agreed to and adjusted the following Treaty of Limits between Nicaragua and Costa Rica.

ARTICLE I. The Republic of Nicaragua and the Republic of Costa Rica declare in the most solemn and express terms that if for one moment they were about to enter into a struggle for reason of limits and for others which each one of the high contracting parties considered to be legal and a matter of honor, now after having given each other repeated proofs of good understanding, peaceful principles, and true fraternity, they are willing to bind themselves, as they formally do, to secure that the peace happily re-established should be each day more and more affirmed between the Government and the people of both nations, not only for the good and

advantage of Nicaragua and Costa Rica, but for the happiness and prosperity which, to a certain extent, our sisters, the other Central American Republics, will derive from it.

ARTICLE II. The dividing line between the two Republics, starting from the Northern Sea, shall begin at the end of Punta de Castilla, at the mouth of the San Juan de Nicaragua river, and shall run along the right bank of the said river up to a point three English miles distant from Castillo Viejo, said distance to be measured between the exterior works of said castle and the above-named point. From here, and taking the said works as centre, a curve shall be drawn along said works, keeping at the distance of three English miles from them, in its whole length, until reaching another point, which shall be at the distance of two miles from the bank of the river on the other side of the castle. From here the line shall continue in the direction of the Sapoá river, which empties into the Lake of Nicaragua, and it shall follow its course, keeping always at the distance of two miles from the right bank of the San Juan river all along its windings, up to reaching its origin in the lake; and from there along the right shore of the said lake until reaching the Sapoá river, where the line parallel to the bank and shore will terminate. From the point in which the said line shall coincide with the Sapoá river—a point which, according to the above description, must be two miles distant from the lake—an astronomic straight line shall be drawn to the central point of the Salinas Bay in the Southern Sea, where the line marking the boundary between the two contracting Republics shall end.

ARTICLE III. Such surveys as may be required to locate this boundary, whether in whole or in part, shall be made by Commissioners appointed by the two Governments; and the two Governments shall agree also as to the time when the said survey shall be made. Said Commissioners shall have the power to somewhat deviate from the curve around the castle, from the line parallel to the banks of the river and the lake, or from the astronomic straight line between Sapoá and Salinas, if they find that natural land-marks can be substituted with advantage.

ARTICLE IV. The Bay of San Juan del Norte, as well as the Salinas Bay, shall be common to both Republics, and, therefore, both the advantages of their use and the obligation to contribute to their defence shall also be common. Costa Rica shall be bound, as far as the portion of the banks of the San Juan river, which correspond to it is concerned, to contribute to its custody in the same way as the two Republics shall contribute to the defence of the river in case of external aggression; and this they shall do with all the efficiency within their reach.

ARTICLE V. As long as Nicaragua does not recover the full possession of all her rights in the port of San Juan del Norte, the use and possession of Punta de Castilla shall be common and equal both for Nicaragua and Costa Rica; and in the meantime, and as long as this community lasts, the boundary shall be the whole course of the Colorado river. It is furthermore stipulated that, as long as the said port of San Juan del Norte remains a *free* port, Costa Rica shall not charge Nicaragua any custom duties at Punta de Castilla.

ARTICLE VI. The Republic of Nicaragua shall have exclusively the dominion and sovereign jurisdiction over the waters of the San Juan river from its origin in the Lake to its mouth in the Atlantic; but the Republic

of Costa Rica shall have the perpetual right of free navigation on the said waters, between the said mouth and the point, three English miles distant from Castillo Viejo, said navigation being for the purposes of commerce either with Nicaragua or with the interior of Costa Rica, through the San Carlos river, the Sarapiquí, or any other way proceeding from the portion of the bank of the San Juan river, which is hereby declared to belong to Costa Rica. The vessels of both countries shall have the power to land indiscriminately on either side of the river, at the portion thereof where the navigation is common; and no charges of any kind, or duties, shall be collected unless when levied by mutual consent of both Governments.

ARTICLE VII. It is agreed that the territorial division made by this treaty cannot be understood as impairing in any way the obligations contracted whether in public treaties or in contracts of canalization or public transit by the Government of Nicaragua previous to the conclusion of the present treaty; on the contrary, it is understood that Costa Rica assumes those obligations, as far as the portion which corresponds to its territory is concerned, without injury to the eminent domain and sovereign right which it has over the same.

ARTICLE VIII. If the contracts of canalization or transit entered into by the Government of Nicaragua previous to its being informed of the conclusion of this treaty should happen to be invalidated for any reason whatever, Nicaragua binds herself not to enter into any other arrangement for the aforesaid purposes without first hearing the opinion of the Government of Costa Rica as to the disadvantages which the transaction might occasion the two countries; provided that the said opinion is rendered within the period of 30 days after the receipt of the communication asking for it, if Nicaragua should have said that the decision was urgent; and, if the transaction does not injure the natural rights of Costa Rica, the vote asked for shall be only advisory.

ARTICLE IX. Under no circumstances, and even in case that the Republics of Costa Rica and Nicaragua should unhappily find themselves in a state of war, neither of them shall be allowed to commit any act of hostility against the other, whether in the port of San Juan del Norte, or in the San Juan river, or the Lake of Nicaragua.

ARTICLE X. The stipulation of the foregoing article being essentially important for the proper custody of both the port and the river against foreign aggression, which would affect the general interests of the country, the strict performance thereof is left under the special guarantee which, in the name of the mediator Government, its Minister Plenipotentiary herein present is ready to give, and does hereby give, in use of the faculties vested in him for that purpose by his Government.

ARTICLE XI. In testimony of the good and cordial understanding which is established between the Republics of Nicaragua and Costa Rica, they mutually give up all claims against each other, on whatever ground they may be founded, up to the date of the present treaty; and in the same way the two contracting parties do hereby waive all claims for indemnification of damages which they might consider themselves entitled to present against each other.

ARTICLE XII. This treaty shall be ratified, and the ratifications thereof shall be exchanged, at Santiago de Managua within forty days after it is signed.



In testimony whereof we have hereunto subscribed our names to the present instrument, executed in triplicate, together with the Hon. Minister of Salvador, and under the countersign of the respective secretaries of Legation, at the city of San José, in Costa Rica, on the 15th day of April, in the year of our Lord 1858.

MAXIMO JEREZ.

JOSÉ M. CAÑAS.

PEDRO RÓMULO NEGRETE.

MANUEL RIVAS,

*Secretary of the Legation of Nicaragua.*

SALVADOR GONZALEZ,

*Secretary of the Legation of Costa Rica.*

FLORENTINO SOUZA,

*Secretary of the Legation of Salvador.*

**ADDITIONAL ACT.** The undersigned, Ministers of Nicaragua and Costa Rica, wishing to give public testimony of their high esteem and of their feelings of gratitude towards the Republic of Salvador, and the worthy representative of the same, Col. Don Pedro R. Negrete, have agreed that the treaty of territorial limits be accompanied with the following declaration, namely:

"Whereas, the Government of Salvador has given to the Governments of Costa Rica and Nicaragua the most authentic testimony of its noble feelings, and of its high appreciation of the value and necessity of cultivating fraternal sympathy among these Republics, and has interested itself as efficiently as friendly in the equitable settlement of the differences which unhappily have existed between the high contracting parties, a settlement which has been secured by the two Legations, owing in great part to the estimable and efficient action of the Hon. Señor Negrete, Minister Plenipotentiary of the said Government, who proved to be the right person to accomplish the generous mediation for which he was appointed, and who has known perfectly well how to meet the intentions of his Government, and owing also to the important aid, to the learning and to the impartial suggestions of the same Minister during the discussion of the subject, we, the Representatives of Costa Rica and Nicaragua, in the name of our respective countries, do hereby fulfil the pleasant duty of declaring and recording here all the gratitude which we feel for the patriotism, high mindedness, fraternity, and benevolence characterizing the Government of Salvador.

In testimony whereof we have hereunto subscribed our names and signed this, in triplicate, in the presence of the Hon. Minister of Salvador, under the countersign of the respective Secretaries of Legation, in the city of San José, the capital of Costa Rica, on the 15th day of April, in the year of our Lord 1858.

MÁXIMO JEREZ.

JOSÉ M. CAÑAS.

MANUEL RIVAS,

*Secretary of the Legation of Nicaragua.*

SALVADOR GONZALEZ,

*Secretary of the Legation of Costa Rica.*

## DENMARK.

*Convention for the arbitration of the Carlos Butterfield claims.*

[Signed December 6, 1888; ratifications exchanged at Washington, May 23, 1889; proclaimed 1889.]

Whereas the Government of the United States of America has heretofore presented to the Kingdom of Denmark the claim of Carlos Butterfield and Company, of which Carlos Butterfield now deceased was the surviving partner, for an indemnity for the seizure and detention of the two vessels, the steamer Ben Franklin and the Barque Catherine Augusta, by the authorities of the Island of St. Thomas of the Danish West India Islands in the years 1854 and 1855; for the refusal of the ordinary right to land cargo for the purpose of making repairs; for the injuries resulting from a shot fired into one of the vessels; and for other wrongs:

Whereas the said Governments have not been able to arrive at a conclusive settlement thereof: and

Whereas each of the parties hereto has entire confidence in the learning, ability and impartiality of Sir Edmund Monson, Her British Majesty's Envoy extraordinary and Minister plenipotentiary in Athens,

Now therefore the undersigned, Raamus B. Anderson, Minister Resident of the United States of America at Copenhagen, and Baron O. D. Rosenörn-Lehn, Royal Danish Minister of Foreign Affairs, duly empowered thereto by their respective Governments have agreed upon the stipulations contained in the following Articles:

ARTICLE I. The said claim of Carlos Butterfield and Company shall be referred to the said Sir Edmund Monson, Her British Majesty's Envoy extraordinary and Minister plenipotentiary in Athens, as sole arbitrator thereof in conformity with the conditions hereinafter expressed; to which end the High Contracting Parties agree to communicate to him in writing their common desire to commit the matter to his arbitration.

ARTICLE II. The Arbitrator shall receive in evidence before him duly certified copies of all documents, records, affidavits, or other papers heretofore filed in support of or against the claim in the proper department of the respective Governments, copies of which shall at the same time be furnished to the other Government. Each Government shall file its evidence before the arbitrator within seventy-five days after its receipt of notice of his acceptance of the position conferred upon him.

Each party shall be allowed seventy-five days thereafter to file with the arbitrator a written argument. The arbitrator shall render his award within sixty days after the date at which the arguments of both parties shall have been received.

ARTICLE III. The expenses of such arbitration, which shall include the compensation of a clerk at the rate of not more than two hundred dollars a month, should the arbitrator request such aid, shall be borne by the two Governments jointly in equal moities.

ARTICLE IV. The High Contracting Parties agree to accept the decision of the arbitrator as final and conclusive and to abide by and perform the same in good faith and without unnecessary delay.

ARTICLE V. This agreement shall be ratified by each Government and the ratifications exchanged at Washington as soon as possible.

In witness whereof the respective Plenipotentiaries have signed and sealed the present Agreement in duplicate in the English and Danish languages.

Done at Copenhagen, this sixth day of December in the year of Our Lord, one thousand eight hundred and eighty-eight.

R. B. ANDERSON [SEAL]

O. D. ROSENÖRN LEHN [SEAL]

### ECUADOR.

#### *Convention for the adjustment of claims.*

[Concluded November 26, 1862; ratifications exchanged at Quito, July 27, 1864; proclaimed September 8, 1864.]

The United States of America and the Republic of Ecuador, desiring to adjust the claims of citizens of said States against Ecuador, and of citizens of Ecuador against the United States, have, for that purpose, appointed and conferred full powers, respectively, to wit:

The President of the United States on Frederick Hassanrek, Minister Resident of the United States in Ecuador, and the President of Ecuador on Juan José Flores, General-in-Chief of the Armies of the Republic:

Who, after exchanging their full powers, which were found in good and proper form, have agreed upon the following articles:

ARTICLE I. All claims on the part of corporations, companies or individuals, citizens of the United States, upon the Government of Ecuador, or of corporations, companies or individuals, citizens of Ecuador, upon the Government of the United States, shall be referred to a Board of Commissioners consisting of two members, one of whom shall be appointed by the Government of the United States, and one by the Government of Ecuador. In case of death, absence, resignation or incapacity of either Commissioner, or in the event of either Commissioner omitting or ceasing to act, the Government of the United States or that of Ecuador, respectively, or the Minister of the United States in Ecuador, in the name of his Government, shall forthwith proceed to fill the vacancy thus occasioned. The Commissioners so named shall meet in the city of Guayaquil within ninety days from the exchange of the ratifications of this convention, and before proceeding to business shall make solemn oath that they will carefully examine and impartially decide according to justice, and in compliance with the provisions of this convention, all claims that shall be submitted to them; and such oath shall be entered on the record of their proceedings.

The Commissioners shall then proceed to name an Arbitrator or Umpire, to decide upon any case or cases concerning which they may disagree, or upon any point of difference which may arise in the course of their proceedings. And if they cannot agree in the selection, the Umpire shall be appointed by her Britannic Majesty's Chargé d'Affaires, or (excepting the Minister Resident of the United States) by any other diplomatic agent in Quito whom the two high contracting parties shall invite to make such appointment.

ARTICLE II. The Arbitrator or Umpire being appointed, the Commissioners shall, without delay, proceed to examine the claims which may be presented to them by either of the two Governments; and they shall hear, if required, one person in behalf of each Government on every separate claim. Each Government shall furnish, upon request of either Commissioner, such papers in its possession as may be deemed important to the just determination of any claim or claims.

In cases where they agree to award an indemnity, they shall determine the amount to be paid. In cases in which said Commissioners cannot agree, the points of difference shall be referred to the Umpire, before whom each of the Commissioners may be heard, and whose decision shall be final.

ARTICLE III. The Commissioners shall issue certificates of the sums to be paid to the claimants, respectively, whether by virtue of the awards agreed to between themselves or of those made by the Umpire; and the aggregate amount of all sums decreed by the Commissioners, and of all sums accruing from awards made by the Umpire under the authority conferred by the fifth article, shall be paid to the Government to which the respective claimants belong. Payment of said sums shall be made in equal annual instalments, to be completed within nine years from the date of the termination of the labors of the Commission, the first payment to be made six months after the same date. To meet these payments both Governments pledge the revenues of their respective nations.

ARTICLE IV. The Commission shall terminate its labors in twelve months from the date of its organization. They shall keep a record of their proceedings, and may appoint a Secretary versed in the knowledge of the English and Spanish languages.

ARTICLE V. The proceedings of this Commission shall be final and conclusive with respect to all pending claims. Claims which shall not be presented to the Commission within the twelve months it remains in existence will be disregarded by both Governments, and considered invalid. In the event that, upon the termination of the labors of said Commission, any case or cases should be pending before the Umpire, and awaiting his decision, said Umpire is hereby authorized to make his decision or award in such case or cases, and his certificate thereof in each case, transmitted to each of the two Governments, shall be held to be binding and conclusive: *Provided, however,* That his decision shall be given within thirty days from the termination of the labors of the Commission, at the expiration of which thirty days his power and authority shall cease.

ARTICLE VI. Each Government shall pay its own Commissioner; but the Umpire, as well as the incidental expenses of the Commission, shall be paid one-half by the United States and the other half by Ecuador.

ARTICLE VII. The present convention shall be ratified and the ratifications exchanged in the city of Quito.

In faith whereof, we, the respective Plenipotentiaries, have signed this convention and hereunto affixed our seals, in the city of Guayaquil, this twenty-fifth day of November, in the year of our Lord 1862.

[SEAL.]

[SEAL.]

F. HASSAUREK.

JUAN JOSÉ FLORES.

*Convention for the arbitration of the Santos claim.*

[Signed February 28, 1893; ratifications exchanged at Washington, November 6, 1894; proclaimed November 7, 1894.]

The United States of America, and the Republic of Ecuador, being desirous of removing all questions of difference between them, and of maintaining their good relations, in a manner consonant to their just interests and dignity, have decided to conclude a convention, and for that purpose have named as their respective Plenipotentiaries, to wit:

The President of the United States; Rowland Blennerhasset Mahany, Envoy Extraordinary and Minister Plenipotentiary of the United States to Ecuador; and

The President of Ecuador; Honorato Vasquez, Plenipotentiary *ad hoc*, of that Republic; who, having communicated to each other their respective Full Powers, found in good and due form, have agreed upon the following articles:

ARTICLE I. The two governments agree to refer the decision of an arbitrator, to be designated in the manner hereinafter provided, the claim presented by the Government of the United States against that of the Republic of Ecuador, in behalf of Julio R. Santos, a native of Ecuador, and naturalized as a citizen of the United States in the year 1874; the said claim being for injuries to his person and property, growing out of his arrest and imprisonment by the authorities of Ecuador, and other acts of the said authorities in the years 1884 and 1885.

ARTICLE II. 1. In order to secure the services of a competent and impartial arbitrator, it is agreed that the Government of Her Britannic Majesty be requested to authorize its diplomatic representative in Quito, to act in that capacity; or in case of his absence from the country, that this permission be given his successor.

2. In case of the failure of the diplomatic representative of Her Britannic Majesty's Government, or of the successor of the said representative, to act as such arbitrator, then the said representative, or his successor, be requested to name an arbitrator who shall not be a citizen of either of the United States or of Ecuador.

3. Any vacancy in the office of Arbitrator, to be filled in the same manner as the original appointment.

ARTICLE III. 1. As soon as may be after the designation of the Arbitrator, not to exceed the period of ninety days, the written or printed case of each of the contracting parties, accompanied by the documents, the official correspondence and other evidence on which each relies, shall be delivered to the Arbitrator, and to the agent of the other party; and within ninety days after such delivery and exchange of the cases of the two parties, either party may, in like manner, deliver to the Arbitrator, and to the agent of the other side, a counter-case to the documents and evidence presented by the other party, with such written or printed argument as may, by each, be deemed proper. And each government shall furnish upon the request of the other, or its agent, such papers in its possession as may be deemed important to the just determination of the claim.

2. Within the last named period of ninety days, the Arbitrator may also call for such evidence as he may deem proper, to be furnished within the same period; and shall also receive such oral and documentary evidence

as each government may offer. Each government shall also furnish, upon the requisition of the Arbitrator, all documents in its possession, which may be deemed by him as material to the just determination of the claim.

3. Within sixty days after the last mentioned period of ninety days, the Arbitrator shall render his opinions and decisions in writing, and certify the same to the two Governments. These decisions and opinions shall embrace the following points, to-wit:

(a) Whether, according to the evidence adduced, Julio R. Santos, by his return to and residence in Ecuador, did or did not, under the provisions of the Treaty of Naturalization between the two Governments, concluded May 6, 1872, forfeit his United States citizenship as to Ecuador, and resume the obligations of the latter country.

(b) If he did not so forfeit his United States citizenship, whether or not it was shown by the evidence adduced, that Julio R. Santos has been guilty of such acts of unfriendliness and hostility to the Government of Ecuador, as, under the Law of Nations, deprived him of the consideration and protection due a neutral citizen of a friendly Nation.

ARTICLE IV. 1. In case either one or the other of the points recited in clauses (a) and (b) of the last preceding article, should be decided in favor of the contention of the Government of Ecuador, said Government shall be held to no further responsibility to that of the United States for arrest, imprisonment, and other acts of the authorities of Ecuador towards Julio R. Santos, during the years 1884 and 1885.

2. On the other hand, should the Arbitrator decide the above recited points against the contention of Ecuador, he shall, after a careful examination of the evidence touching the injuries and losses to the person and property of the said Santos, which shall have been laid before him concerning the arrest and imprisonment of said Santos, and other acts of the authorities of Ecuador towards him, during the years 1884 and 1885, award such damages for said injuries and losses as may be just and equitable; which shall be certified to the two Governments and shall be final and conclusive.

ARTICLE V. 1. Both Governments agree to treat the decisions of the Arbitrator and his award as final and conclusive.

2. Should a pecuniary indemnity be awarded, it shall be specified in the gold coin of the United States, and shall be paid to the Government thereof within sixty days after the beginning of the first session of the Congress of Ecuador, held subsequent to the rendition of the award, and the said award shall bear interest at six per centum from the date of its rendition.

3. The Government of Ecuador, however, reserves the right to pay, before the expiration of the above stated time, the whole amount to the Government of the United States, with interest at six per centum from the date of the announcement of the award till the date of the payment thereof.

ARTICLE VI. 1. Each government shall pay its own agent and counsel, if any, for the expenses of preparing and submitting its case to the Arbitrator.

2. All other expenses, including reasonable compensation to the Secretary, if any, of the Arbitrator, shall be paid upon the certificates of the Arbitrator, by the two Governments in equal moieties.

ARTICLE VII. The present convention shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof; by the Congress of Ecuador and by the President thereof; and the ratifications exchanged at Washington as soon as possible.

In faith whereof, the Plenipotentiaries have signed and sealed this Convention in duplicate, in the City of Quito, this twenty-eighth day of February, in the year of our Lord one thousand eight hundred and ninety three.

[SEAL.]

ROWLAND BLENNERHASSET MAHANY.

[SEAL.]

HONORATO VASQUEZ.

### FRANCE.

*Convention concerning settlement of certain claims of the citizens of either country against the other.*

[Concluded January 15, 1880; ratifications exchanged at Washington June 23, 1880; proclaimed June 25, 1880.]

The United States of America and the French Republic, animated by the desire to settle and adjust amicably the claims made by the citizens of either country against the government of the other, growing out of acts committed by the civil or military authorities of either country as herein-after defined, during a state of war or insurrection, under the circumstances hereinafter specified, have agreed to make arrangements for that purpose, by means of a Convention, and have named as their Plenipotentiaries to confer and agree thereupon, as follows.

The President of the United States; William Maxwell Evarts, Secretary of State of the United States; and the President of the French Republic; Georges Maxime Outrey, Envoy Extraordinary and Minister Plenipotentiary of France at Washington, Commander of the National Order of the Legion of Honor, &c., &c., &c.;

Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon the following articles:

ARTICLE I. All claims on the part of corporations, companies or private individuals, citizens of the United States, upon the Government of France, arising out of acts committed against the persons or property of citizens of the United States not in the service of the enemies of France, or voluntarily giving aid and comfort to the same, by the French civil or military authorities, upon the high seas or within the territory of France, its colonies and dependencies, during the late war between France and Mexico, or during the war of 1870-'71 between France and Germany and the subsequent civil disturbances known as the "Insurrection of the Commune"; and on the other hand, all claims on the part of corporations, companies or private individuals, citizens of France, upon the Government of the United States, arising out of acts committed against the persons or property of citizens of France not in the service of the enemies of the United States, or voluntarily giving aid and comfort to the same, by the civil or military authorities of the Government of the United States, upon the high seas or within the territorial jurisdiction of the United States, during the period comprised between the thirteenth day of April, eighteen

hundred and sixty-one, and the twentieth day of August, eighteen hundred and sixty-six, shall be referred to three Commissioners, one of whom shall be named by the President of the United States, and one by the French Government, and the third by His Majesty the Emperor of Brazil.

ARTICLE II. The said Commission, thus constituted, shall be competent and obliged to examine and decide upon all claims of the aforesaid character, presented to them by the citizens of either country, except such as have been already diplomatically, judicially or otherwise by competent authorities, heretofore disposed of by either Government; but no claim or item of damage or injury based upon the emancipation or loss of slaves shall be entertained by the said Commission.

ARTICLE III. In case of the death, prolonged absence, or incapacity to serve of one of the said Commissioners, or in the event of one Commissioner omitting, or declining, or ceasing to act as such, then the President of the United States, or the Government of France, or His Majesty the Emperor of Brazil, as the case may be, shall forthwith proceed to fill the vacancy so occasioned by naming another Commissioner within three months from the date of the occurrence of the vacancy.

ARTICLE IV. The Commissioners named as hereinbefore provided shall meet in the city of Washington at the earliest convenient time within six months after the exchange of the ratifications of this convention, and shall, as their first act in so meeting, make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment and according to public law, justice and equity, without fear, favor, or affection, all claims within the description and true meaning of Articles I. and II., which shall be laid before them on the part of the Governments of the United States and of France respectively; and such declaration shall be entered on the record of their proceedings: Provided, however, that the concurring judgment of any two Commissioners shall be adequate for every intermediate decision arising in the execution of their duty and for every final award.

ARTICLE V. The Commissioners shall, without delay, after the organization of the Commission, proceed to examine and determine the claims specified in the preceding articles, and notice shall be given to the respective Governments of the day of their organization and readiness to proceed to the transaction of the business of the Commission. They shall investigate and decide said claims in such order and in such manner as they may think proper, but upon such evidence or information only as shall be furnished by or on behalf of the respective Governments. They shall be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of the respective Governments in support of, or in answer to, any claim, and to hear, if required, one person on each side whom it shall be competent for each Government to name as its Counsel or Agent to present and support claims on its behalf, on each and every separate claim. Each Government shall furnish at the request of the Commissioners, or of any two of them, the papers in its possession which may be important to the just determination of any of the claims laid before the Commission.

ARTICLE VI. The concurring decisions of the Commissioners, or of any two of them, shall be conclusive and final. Said decisions shall in every case be given upon each individual claim, in writing, stating, in the event



of a pecuniary award being made, the amount or equivalent value of the same in gold coin of the United States or of France, as the case may be; and in the event of interest being allowed on such award, the rate thereof and the period for which it is to be computed shall be fixed, which period shall not extend beyond the close of the Commission; and said decision shall be signed by the Commissioners concurring therein.

ARTICLE VII. The High Contracting Parties hereby engage to consider the decision of the Commissioners, or of any two of them, as absolutely final and conclusive upon each claim decided upon by them, and to give full effect to such decisions without any objections, evasions, or delay whatever.

ARTICLE VIII. Every claim shall be presented to the Commissioners within a period of six months, reckoned from the day of their first meeting for business, after notice to the respective Governments, as prescribed in Article V of this Convention. Nevertheless, in any case where reasons for delay shall be established to the satisfaction of the Commissioners, or of any two of them, the period for presenting the claim may be extended by them to any time not exceeding three months longer.

The Commissioners shall be bound to examine and decide upon every claim within two years from the day of their first meeting for business as aforesaid; which period shall not be extended except only in case the proceedings of the Commission shall be interrupted by the death, incapacity, retirement or cessation of the functions of any one of the Commissioners, in which event the period of two years herein prescribed shall not be held to include the time during which such interruption may actually exist.

It shall be competent in each case for the said Commissioners to decide whether any claim has, or has not, been duly made, preferred, and laid before them, either wholly, or to any and what extent, according to the true intent and meaning of this Convention.

ARTICLE IX. All sums of money which may be awarded by the Commissioners as aforesaid, shall be paid by the one Government to the other, as the case may be, at the capital of the Government to receive such payment, within twelve months after the date of the final award, without interest, and without any deduction save as specified in Article X.

ARTICLE X. The Commissioners shall keep an accurate record and correct minutes or notes of all their proceedings, with the dates thereof; and the Governments of the United States and of France may each appoint and employ a Secretary versed in the language of both countries, and the Commissioners may appoint any other necessary officer or officers to assist them in the transaction of the business which may come before them.

Each Government shall pay its own Commissioner, Secretary and Agent or Counsel, and at the same or equivalent rates of compensation, as near as may be, for like officers on the one side as on the other. All other expenses, including the compensation of the third Commissioner, which latter shall be equal or equivalent to that of the other Commissioners, shall be defrayed by the two Governments in equal moieties.

The whole expenses of the Commission, including contingent expenses, shall be defrayed by a ratable deduction on the amount of the sums awarded by the Commissioners, provided always that such deduction shall not exceed the rate of five per centum on the sums so awarded. If

the whole expenses shall exceed this rate, then the excess of expense shall be defrayed jointly by the two Governments in equal moieties.

ARTICLE XI. The High Contracting Parties agree to consider the result of the proceedings of the Commission provided by this Convention as a full, perfect and final settlement of any and every claim upon either Government within the description and true meaning of Articles I. and II.; and that every such claim, whether or not the same may have been presented to the notice of, made, preferred or laid before the said Commission, shall, from and after the conclusion of the proceedings of the said Commission, be considered and treated as finally settled, concluded and barred.

ARTICLE XII. The present convention shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by the President of the French Republic, and the ratifications shall be exchanged at Washington, at as early a day as may be possible within nine months from the date hereof.

In testimony whereof the respective Plenipotentiaries have signed the present convention, in the English and French languages, in duplicate, and hereunto affixed their respective seals.

Done at the city of Washington, the fifteenth day of January, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.]

WILLIAM MAXWELL EVARTS.

[SEAL.]

MAX OUTREY.

*Convention for the extension of the term of the claims commission established under the convention of January 15, 1880, to July 1, 1883.*

[Concluded July 19, 1882; ratifications exchanged at Washington December 29, 1882; proclaimed December 29, 1882.]

The United States of America and the French Republic, being persuaded that the labors of the Commission for the settlement of the claims of citizens of either country against the Government of the other, which was organized under the convention between the two Governments signed at Washington the fifteenth day of January, 1880, cannot be concluded within the term fixed by that convention, have deemed it expedient to conclude a supplementary convention extending the term of duration of said Commission for a further period, and have named as their respective plenipotentiaries to that end as follows:

The President of the United States, Frederick T. Frelinghuysen, Secretary of State of the United States; and

The President of the French Republic, Théodore-Justin-Dominique Roustan, Envoy Extraordinary and Minister Plenipotentiary of France at Washington, Commander of the National Order of the Legion of Honor, etc., etc.;

Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon the following article:

#### SOLE ARTICLE.

The term of two years fixed by the second paragraph of Article VIII. of the convention between the United States and the French Republic, concluded January 15, 1880, within which the Commissioners appointed thereunder shall be bound to examine and decide upon every claim presented to them, is hereby extended to July first, 1883.

Nothing in this agreement contained shall extend or alter the terms fixed in the first paragraph of said Article VIII. for the presentation of claims, but the same shall remain as therein fixed.

If the proceedings of the Commission shall be interrupted by the death, incapacity, retirement or cessation of the functions of any one of the Commissioners, then the period for which the term of the Commission is hereby extended shall not be held to include the time during which such interruption may actually exist.

The present convention shall be ratified and the ratifications exchanged at Washington at as early a day as may be practicable.

In testimony whereof the respective plenipotentiaries have signed the present convention, in the English and French languages, in duplicate, and have hereunto affixed their respective seals.

Done at the city of Washington the nineteenth day of July, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.]

FRED'K T. FRELINGHUYSEN.

[SEAL.]

TH. ROUSTAN.

*Convention for the further extension of the term of the claims commission established under the convention of January 15, 1880, to April 1, 1884.*

[Concluded February 8, 1883; ratifications exchanged at Washington June 25, 1883: proclaimed June 25, 1883.]

The Government of the United States of America and the Government of the French Republic, being persuaded that the labors of the Commission for the settlement of the claims of citizens of either country against the Government of the other, which was organized under the convention between the two Governments signed at Washington the fifteenth day of January, 1880, and which was extended to July first, 1883, by the supplementary convention of July 19th, 1882, cannot be concluded by July 1st, 1883, have deemed it expedient to conclude another supplementary convention extending the term of duration of said Commission for a further period, and have named as their respective plenipotentiaries to that end, as follows:

The President of the United States, Frederick T. Frelinghuysen. Secretary of State of the United States, and the President of the French Republic, Théodore Justin Dominique Roustan, Envoy Extraordinary and Minister Plenipotentiary of France at Washington, Commander of the National Order of the Legion of Honor, etc. etc.

Who, after having communicated to each other their respective full powers found in good and due form, have agreed upon the following articles:

ARTICLE I. The term of two years fixed by the second paragraph of Article VIII. of the convention between the United States and the French Republic, concluded January fifteenth, 1880, within which the Commissioners appointed thereunder shall be bound to examine and decide upon every claim presented to them which was extended to July 1st, 1883, by the supplementary convention of July 19th, 1882, is hereby extended to the first day of April, A. D. 1884.

Nothing in this agreement contained shall extend or alter the terms fixed in the first paragraph of said Article VIII. for the presentation of claims, but the same shall remain as therein fixed.

If the proceedings of the Commission shall be interrupted by the death, or incapacity of any one of the Commissioners, then the period for which the term of the Commission is hereby extended shall not be held to include the time during which such interruption may actually exist.

ARTICLE II. No testimony or evidence either in support of or in answer to any claim shall be presented to, or received by the Commission after the first day of July 1883.

The present convention shall be ratified and the ratifications exchanged at Washington at as early a day as may be practicable.

In testimony whereof the respective Plenipotentiaries have signed the present convention in the English and French languages, in duplicate, and have hereunto affixed their respective seals.

Done at the City of Washington the eighth day of February in the year of our Lord, one thousand eight hundred and eighty-three.

[SEAL.]

FRED'K T. FRELINGHUYSEN.

[SEAL.]

TH. ROUSTAN.

#### GREAT BRITAIN.

##### *Treaty of amity, commerce and navigation.*

[Concluded November 19, 1794; ratification exchanged at London October 28, 1795; proclaimed February 29, 1796.]

His Britannic Majesty and the United States of America, being desirous, by a treaty of amity, commerce and navigation, to terminate their differences in such a manner, as, without reference to the merits of their respective complaints and pretensions, may be the best calculated to produce mutual satisfaction and good understanding; and also to regulate the commerce and navigation between their respective countries, territories and people, in such a manner as to render the same reciprocally beneficial and satisfactory; they have, respectively, named their Plenipotentiaries, and given them full powers to treat of, and conclude the said treaty, that is to say:

His Britannic Majesty has named for his Plenipotentiary, the Right Honorable William Wyndham Baron Grenville of Wotton, one of His Majesty's Privy Council, and His Majesty's Principal Secretary of State for Foreign Affairs; and the President of the said United States, by and with the advice and consent of the Senate thereof, hath appointed for their Plenipotentiary, the Honorable John Jay, Chief Justice of the said United States, and their Envoy Extraordinary to His Majesty;

Who have agreed on and concluded the following articles:

ARTICLE IV. Whereas it is uncertain whether the river Mississippi extends so far to the northward as to be intersected by a line to be drawn due west from the Lake of the Woods, in the manner mentioned in the treaty of peace between His Majesty and the United States: it is agreed that measures shall be taken in concert between His Majesty's Government in America and the Government of the United States, for making a joint survey of the said river from one degree of latitude below the falls of St. Anthony, to the principal source or sources of the said river, and also of the parts adjacent thereto; and that if, on the result of such survey, it

should appear that the said river would not be intersected by such a line as is above mentioned, the two parties will thereupon proceed, by amicable negotiation, to regulate the boundary line in that quarter, as well as all other points to be adjusted between the said parties, according to justice and mutual convenience, and in conformity to the intent of the said treaty.

- ARTICLE V. Whereas doubts have arisen what river was truly intended under the name of the river St. Croix, mentioned in the said treaty of peace, and forming a part of the boundary therein described; that question shall be referred to the final decision of commissioners to be appointed in the following manner, viz:

One commissioner shall be named by His Majesty, and one by the President of the United States, by and with the advice and consent of the Senate thereof, and the said two commissioners shall agree on the choice of a third; or if they cannot so agree, they shall each propose one person, and of the two names so proposed, one shall be drawn by lot in the presence of the two original Commissioners. And the three Commissioners so appointed shall be sworn, impartially to examine and decide the said question, according to such evidence as shall respectively be laid before them on the part of the British Government and of the United States. The said Commissioners shall meet at Halifax, and shall have power to adjourn to such other place or places as they shall think fit. They shall have power to appoint a Secretary, and to employ such surveyors or other persons as they shall judge necessary. The said Commissioners shall, by a declaration, under their hands and seals, decide what river is the river St. Croix, intended by the treaty. The said declaration shall contain a description of the said river, and shall particularize the latitude and longitude of its mouth and of its source. Duplicates of this declaration and of the statements of their accounts, and of the journal of their proceedings, shall be delivered by them to the agent of His Majesty, and to the agent of the United States, who may be respectively appointed and authorized to manage the business on behalf of the respective Governments. And both parties agree to consider such decision as final and conclusive, so as that the same shall never thereafter be called in question, or made the subject of dispute or difference between them.

ARTICLE VI. Whereas it is alleged by divers British merchants and others His Majesty's subjects, that debts, to a considerable amount, which were bona fide contracted before the peace, still remain owing to them by citizens or inhabitants of the United States, and that by the operation of various lawful impediments since the peace, not only the full recovery of the said debts has been delayed, but also the value and security thereof have been, in several instances, impaired and lessened, so that, by the ordinary course of judicial proceedings, the British creditors cannot now obtain, and actually have and receive full and adequate compensation for the losses and damages which they have thereby sustained: It is agreed, that in all such cases, where full compensation for such losses and damages cannot, for whatever reason, be actually obtained, had and received by the said creditors in the ordinary course of justice, the United States will make full and complete compensation for the same to the said creditors: But it is distinctly understood, that this provision is to extend to such losses only as have been occasioned by the lawful impediments aforesaid,

and is not to extend to losses occasioned by such insolvency of the debtors or other causes as would equally have operated to produce such loss, if the said impediments had not existed; nor to such losses or damages as have been occasioned by the manifest delay or negligence, or wilful omission of the claimant.

For the purpose of ascertaining the amount of any such losses and damages, five Commissioners shall be appointed and authorized to meet and act in manner following, viz: Two of them shall be appointed by His Majesty, two of them by the President of the United States by and with the advice and consent of the Senate thereof, and the fifth by the unanimous voice of the other four; and if they should not agree in such choice, then the Commissioners named by the two parties shall respectively propose one person, and of the two names so proposed, one shall be drawn by lot, in the presence of the four original Commissioners. When the five Commissioners thus appointed shall first meet, they shall, before they proceed to act, respectively take the following oath, or affirmation, in the presence of each other; which oath, or affirmation, being so taken and duly attested, shall be entered on the record of their proceedings, viz: I, A. B., one of the Commissioners appointed in pursuance of the sixth article of the Treaty of Amity, Commerce and Navigation, between His Britannic Majesty and the United States of America, do solemnly swear (or affirm) that I will honestly, diligently, impartially and carefully examine, and to the best of my judgment, according to justice and equity, decide all such complaints, as under the said article shall be preferred to the said Commissioners: and that I will forbear to act as a Commissioner, in any case in which I may be personally interested.

Three of the said Commissioners shall constitute a board, and shall have power to do any act appertaining to the said Commission, provided that one of the Commissioners named on each side, and the fifth Commissioner shall be present, and all decisions shall be made by the majority of the voices of the Commissioners then present. Eighteen months from the day on which the said Commissioners shall form a board, and be ready to proceed to business, are assigned for receiving complaints and applications; but they are nevertheless authorized, in any particular cases in which it shall appear to them to be reasonable and just, to extend the said term of eighteen months for any term not exceeding six months, after the expiration thereof. The said Commissioners shall first meet at Philadelphia, but they shall have power to adjourn from place to place as they shall see cause.

The said Commissioners in examining the complaints and applications so preferred to them, are empowered and required, in pursuance of the true intent and meaning of this article, to take into their consideration all claims, whether of principal or interest, or balances of principal and interest, and to determine the same respectively, according to the merits of the several cases, due regard being had to all the circumstances thereof, and as equity and justice shall appear to them to require. And the said Commissioners shall have power to examine all such persons as shall come before them, on oath or affirmation, touching the premises; and also to receive in evidence, according as they may think most consistent with equity and justice, all written depositions, or books, or papers, or copies,

or extracts thereof; every such deposition, book, or paper, or copy, or extract, being duly authenticated, either according to the legal form now respectively existing in the two countries, or in such other manner as the said Commissioners shall see cause to require or allow.

The award of the said Commissioners, or of any three of them as aforesaid, shall in all cases be final and conclusive, both as to the justice of the claim, and to the amount of the sum to be paid to the creditor or claimant; and the United States undertake to cause the sum so awarded to be paid in specie to such creditor or claimant without deduction; and at such time or times and at such place or places, as shall be awarded by the said Commissioners; and on condition of such releases or assignments to be given by the creditor or claimant, as by the said Commissioners may be directed: Provided always, that no such payment shall be fixed by the said Commissioners to take place sooner than twelve months from the day of the exchange of the ratifications of this treaty.

ARTICLE VII. Whereas complaints have been made by divers merchants and others, citizens of the United States, that during the course of the war in which His Majesty is now engaged, they have sustained considerable losses and damage, by reason of irregular or illegal captures or condemnations of their vessels and other property, under color of authority or commissions from His Majesty, and that from various circumstances belonging to the said cases, adequate compensation for the losses and damages so sustained cannot now be actually obtained, had, and received by the ordinary course of judicial proceedings; it is agreed, that in all such cases, where adequate compensation cannot, for whatever reason, be now actually obtained, had, and received by the said merchants and others, in the ordinary course of justice, full and complete compensation for the same will be made by the British Government to the said complainants. But it is distinctly understood that this provision is not to extend to such losses or damages as have been occasioned by the manifest delay or negligence, or wilful omission of the claimant.

That for the purpose of ascertaining the amount of any such losses and damages, five Commissioners shall be appointed and authorized to act in London, exactly in the manner directed with respect to those mentioned in the preceding article, and after having taken the same oath or affirmation, (*mutatis mutandis*,) the same term of eighteen months is also assigned for the reception of claims, and they are in like manner authorized to extend the same in particular cases. They shall receive testimony, books, papers and evidence in the same latitude, and exercise the like discretion and powers respecting that subject; and shall decide the claims in question according to the merits of the several cases, and to justice, equity and the laws of nations. The award of the said Commissioners, or any such three of them as aforesaid, shall in all cases be final and conclusive, both as to the justice of the claim, and the amount of the sum to be paid to the claimant; and His Britannic Majesty undertakes to cause the same to be paid to such claimant in specie, without any deduction, at such place or places, and at such time or times, as shall be awarded by the said Commissioners, and on condition of such releases or assignments to be given by the claimant, as by the said Commissioners may be directed.

And whereas certain merchants and others, His Majesty's subjects, complain that, in the course of the war, they have sustained loss and damage

by reason of the capture of their vessels and merchandise, taken within the limits and jurisdiction of the States and brought into the ports of the same, or taken by vessels originally armed in ports of the said States:

It is agreed that in all such cases where restitution shall not have been made agreeably to the tenor of the letter from Mr. Jefferson to Mr. Hammond, dated at Philadelphia, Sept. 5, 1793, a copy of which is annexed to this treaty; the complaints of the parties shall be and hereby are referred to the Commissioners to be appointed by virtue of this article, who are hereby authorized and required to proceed in the like manner relative to these as to the other cases committed to them; and the United States undertake to pay to the complainants or claimants in specie, without deduction, the amount of such sums as shall be awarded to them respectively by the said Commissioners, and at the times and places which in such awards shall be specified; and on condition of such releases or assignments to be given by the claimants as in the said awards may be directed: And it is further agreed, that not only the now-existing cases of both descriptions, but also all such as shall exist at the time of exchanging the ratifications of this treaty, shall be considered as being within the provisions, intent and meaning of this article.

ARTICLE VIII. It is further agreed that the Commissioners mentioned in this and in the two preceding articles shall be respectively paid in such manner as shall be agreed between the two parties, such agreement being to be settled at the time of the exchange of the ratifications of this treaty. And all other expenses attending the said Commissions shall be defrayed jointly by the two parties, the same being previously ascertained and allowed by the majority of the Commissioners. And in the case of death, sickness or necessary absence, the place of every such Commissioner respectively shall be supplied in the same manner as such Commissioner was first appointed, and the new Commissioners shall take the same oath or affirmation and do the same duties.

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*Letter from Thomas Jefferson to George Hammond.*

PHILADELPHIA, September 5, 1793.

SIR: I am honored with yours of August 30. Mine of the 7th of that month assured you that measures were taken for excluding from all further asylum in our ports vessels armed in them to cruise on nations with which we are at peace, and for the restoration of the prizes the *Lorely Lass*, *Prince William Henry*, and the *Jane of Dublin*; and that should the measures for restitution fail in their effect, the President considered it as incumbent on the United States to make compensation for the vessels.

We are bound by our treaties with three of the belligerent nations, by all the means in our power, to protect and defend their vessels and effects in our ports, or waters, or on the seas near our shores, and to recover and restore the same to the right owners when taken from them. If all the means in our power are used, and fail in their effect, we are not bound by our treaties with those nations to make compensation.

Though we have no similar treaty with Great Britain, it was the opinion of the President that we should use towards that nation the same rule which, under this article, was to govern us with the other nations; and even to extend it to captures made on the high seas and brought into our ports, if done by vessels which had been armed within them.



Having, for particular reasons, forbore to use all the means in our power for the restitution of the three vessels mentioned in my letter of August 7th, the President thought it incumbent on the United States to make compensation for them; and though nothing was said in that letter of other vessels taken under like circumstances, and brought in after the 5th of June, and before the date of that letter, yet when the same forbearance had taken place, it was and is his opinion, that compensation would be equally due.

As to prizes made under the same circumstances, and brought in after the date of that letter, the President determined that all the means in our power should be used for their restitution. If these fail, as we should not be bound by our treaties to make compensation to the other Powers in the analogous case, he did not mean to give an opinion that it ought to be done to Great Britain. But still, if any cases shall arise subsequent to that date, the circumstances of which shall place them on similar ground with those before it, the President would think compensation equally incumbent on the United States.

Instructions are given to the Governors of the different States to use all the means in their power for restoring prizes of this last description found within their ports. Though they will, of course, take measures to be informed of them, and the General Government has given them the aid of the custom-house officers for this purpose, yet you will be sensible of the importance of multiplying the channels of their information as far as shall depend on yourself, or any person under your direction, in order that the Governors may use the means in their power for making restitution.

Without knowledge of the capture they cannot restore it. It will always be best to give the notice to them directly; but any information which you shall be pleased to send to me, also, at any time, shall be forwarded to them as quickly as distance will permit.

Hence you will perceive, sir, that the President contemplates restitution or compensation in the case before the 7th of August; and after that date, restitution if it can be effected by any means in our power. And that it will be important that you should substantiate the fact that such prizes are in our ports or waters.

Your list of the privateers illicitly armed in our ports is, I believe, correct.

With respect to losses by detention, waste, spoliation sustained by vessels taken as before mentioned, between the dates of June 5th and August 7th, it is proposed as a provisional measure that the Collector of the Customs of the district, and the British Consul, or any other person you please, shall appoint persons to establish the value of the vessel and cargo at the time of her capture and of her arrival in the port into which she is brought, according to their value in that port. If this shall be agreeable to you, and you will be pleased to signify it to me, with the names of the prizes understood to be of this description, instructions will be given accordingly to the Collector of the Customs where the respective vessels are

I have the honor to be, &c.,

TH: JEFFERSON.

GEO: HAMMOND, Esq.

*Explanatory article to the treaty of November 19, 1794, releasing the Commissioners under the fifth article from particularizing the latitude and longitude of the river St. Croix.*

[Concluded March 15, 1798; ratification advised by Senate June 5, 1798.]

Whereas by the twenty-eighth article of the treaty of amity, commerce, and navigation between His Britannick Majesty and the United States, signed at London on the nineteenth day of November, one thousand seven hundred and ninety-four, it was agreed that the contracting parties would, from time to time, readily treat of and concerning such further

articles as might be proposed; that they would sincerely endeavour so to form such articles as that they might conduce to mutual convenience and tend to promote mutual satisfaction and friendship; and that such articles, after having been duly ratified, should be added to and make a part of that treaty: And whereas difficulties have arisen with respect to the execution of so much of the fifth article of the said treaty as requires that the Commissioners appointed under the same should in their description particularize the latitude and longitude of the source of the river which may be found to be the one truly intended in the treaty of peace between His Britannick Majesty and the United States, under the name of the river St. Croix, by reason whereof it is expedient that the said Commissioners should be released from the obligation of conforming to the provisions of the said article in this respect. The undersigned being respectively named by His Britannick Majesty and the United States of America their Plenipotentiaries for the purpose of treating of and concluding such articles as may be proper to be added to the said treaty, in conformity to the above-mentioned stipulation, and having communicated to each other their respective full powers, having agreed and concluded, and do hereby declare in the name of His Britannick Majesty and of the United States of America, that the Commissioners appointed under the fifth article of the above-mentioned treaty shall not be obliged to particularize, in their description, the latitude and longitude of the source of the river which may be found to be the one truly intended in the aforesaid treaty of peace under the name of the river St. Croix, but they shall be at liberty to describe the said river, in such other manner as they may judge expedient, which description shall be considered as a complete execution of the duty required of the said Commissioners in this respect by the article aforesaid. And to the end that no uncertainty may hereafter exist on this subject, it is further agreed, That as soon as may be after the decision of the said Commissioners, measures shall be concerted between the Government of the United States and His Britannick Majesty's Governors or Lieutenant Governors in America, in order to erect and keep in repair a suitable monument at the place ascertained and described to be the source of the said river St. Croix, which measures shall immediately thereupon, and as often afterwards as may be requisite, be duly executed on both sides with punctuality and good faith.

This explanatory article, when the same shall have been ratified by His Majesty and by the President of the United States, by and with the advice and consent of their Senate, and the respective ratifications mutually exchanged, shall be added to and make a part of the treaty of amity, commerce, and navigation between His Majesty and the United States, signed at London on the nineteenth day of November, one thousand seven hundred and ninety-four, and shall be permanently binding upon His Majesty and the United States.

In witness whereof we, the said undersigned Plenipotentiaries of His Britannick Majesty and the United States of America, have signed this present article, and have caused to be affixed thereto the seal of our arms.

Done at London this fifteenth day of March, one thousand seven hundred and ninety-eight.

[SEAL.]

[SEAL.]

GRENVILLE.

RUFUS KING.

*Convention providing for payment of indemnity under the sixth and seventh articles of the Treaty of November 19, 1794, and debts under the fourth article of the Treaty of September 3, 1783.*

[Concluded January 8, 1802; ratifications exchanged at London July 15, 1802.]

Difficulties having arisen in the execution of the sixth article of the treaty of amity, commerce and navigation, concluded at London on the nineteenth day of November, one thousand seven hundred and ninety-four, between His Britannic Majesty and the United States of America, and in consequence thereof the proceedings of the Commissioners under the seventh article of the same treaty having been suspended, the parties to the said treaty being equally desirous, as far as may be, to obviate such difficulties, have respectively named Plenipotentiaries to treat and agree respecting the same, that is to say, His Britannic Majesty has named for his Plenipotentiary, the Right Honourable Robert Banks Jenkinson, commonly called Lord Hawkesbury, one of His Majesty's Most Honourable Privy Council, and his Principal Secretary of State for Foreign Affairs; and the President of the United States, by and with the advice and consent of the Senate thereof, has named for their Plenipotentiary, Rufus King, Esquire, Minister Plenipotentiary of the said United States to his Britannic Majesty; who have agreed to and concluded the following articles:

ARTICLE I. In satisfaction and discharge of the money which the United States might have been liable to pay in pursuance of the provisions of the said sixth article, which is hereby declared to be cancelled and annulled, except so far as the same may relate to the execution of the said seventh article, the United States of America hereby engage to pay, and His Britannic Majesty consents to accept, for the use of the persons described in the said sixth article, the sum of six hundred thousand pounds sterling, payable at the times and place, and in the manner following, that is to say, the said sum of six hundred thousand pounds sterling shall be paid at the city of Washington, in three annual instalments of two hundred thousand pounds sterling each, and to such person or persons as shall be authorized by His Britannic Majesty to receive the same; the first of the said instalments to be paid at the expiration of one year, the second instalment at the expiration of two years, and the third and last instalment at the expiration of three years next following the exchange of the ratifications of this convention. And to prevent any disagreement concerning the rate of exchanges, the said payments shall be made in the money of the said United States, reckoning four dollars and forty-four cents to be equal to one pound sterling.

ARTICLE II. Whereas it is agreed by the fourth article of the definitive treaty of peace, concluded at Paris on the third day of September, one thousand seven hundred and eighty-three, between His Britannic Majesty and the United States, that creditors on either side should meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts theretofore contracted, it is hereby declared that the said fourth article, so far as respects its future operation, is hereby recognized, confirmed and declared to be binding and obligatory on His Britannic Majesty and the said United States, and the same shall be accordingly

observed with punctuality and good faith, and so as that the said creditors shall hereafter meet with no lawful impediment to the recovery of the full value in sterling money of their *bona fide* debts.

ARTICLE III. It is furthermore agreed and concluded that the Commissioners appointed in pursuance of the seventh article of the said treaty of amity, commerce and navigation, and whose proceedings have been suspended as aforesaid, shall, immediately after the signature of this convention, re-assemble and proceed in the execution of their duties according to the provisions of the said seventh article, except only that, instead of the sums awarded by the said Commissioners being made payable at the time or times by them appointed, all sums of money by them awarded to be paid to American or British claimants, according to the provisions of the said seventh article, shall be made payable in three equal instalments, the first whereof to be paid at the expiration of one year, the second at the expiration of two years, and the third and last at the expiration of three years next after the exchange of the ratifications of this convention.

ARTICLE IV. This convention, when the same shall have been ratified by His Majesty, and by the President of the United States, by and with the advice and consent of the Senate thereof, and the respective ratifications duly exchanged, shall be binding and obligatory upon His Majesty and the said United States.

In faith whereof we, the undersigned Plenipotentiaries of His Britannic Majesty and of the United States of America, by virtue of our respective full powers, have signed the present convention, and have caused the seals of our arms to be affixed thereto.

Done at London the eighth day of January, one thousand eight hundred and two.

[SEAL.]

HAWKESBURY.

[SEAL.]

RUFUS KING.

*Treaty of peace and amity.*

[Concluded December 24, 1814; ratifications exchanged at Washington February 17, 1815; proclaimed February 18, 1815.]

His Britannic Majesty and the United States of America, desirous of terminating the war which has unhappily subsisted between the two countries, and of restoring, upon principles of perfect reciprocity, peace, friendship and good understanding between them, have, for that purpose, appointed their respective Plenipotentiaries, that is to say:

His Britannic Majesty, on his part, has appointed the Right Honourable James Lord Gambier, late Admiral of the White, now Admiral of the Red Squadron of His Majesty's fleet, Henry Goulburn, Esquire, a member of the Imperial Parliament, and Under Secretary of State, and William Adams, Esquire, Doctor of Civil Laws; and the President of the United States, by and with the advice and consent of the Senate thereof, has appointed John Quincy Adams, James A. Bayard, Henry Clay, Jonathan Russell, and Albert Gallatin, citizens of the United States;

Who, after a reciprocal communication of their respective full powers, have agreed upon the following articles:

ARTICLE I. There shall be a firm and universal peace between His Britannic Majesty and the United States, and between their respective countries, territories, cities, towns and people, of every degree, without exception of places or persons. All hostilities, both by sea and land, shall

cease as soon as this treaty shall have been ratified by both parties, as hereinafter mentioned. All territory, places and possessions whatsoever, taken by either party from the other during the war, or which may be taken after the signing of this treaty, excepting only the islands hereinafter mentioned, shall be restored without delay, and without causing any destruction or carrying away any of the artillery or other public property originally captured in the said forts or places, and which shall remain therein upon the exchange of the ratifications of this treaty, or any slaves or other private property. And all archives, records, deeds and papers, either of a public nature or belonging to private persons, which, in the course of the war, may have fallen into the hands of the officers of either party, shall be, as far as may be practicable, forthwith restored and delivered to the proper authorities and persons to whom they respectively belong. Such of the islands in the Bay of Passamaquoddy as are claimed by both parties, shall remain in the possession of the party in whose occupation they may be at the time of the exchange of the ratifications of this treaty, until the decision respecting the title to the said islands shall have been made in conformity with the fourth article of this treaty. No disposition made by this treaty as to such possession of the islands and territories claimed by both parties shall, in any manner whatever, be construed to affect the right of either.

ARTICLE IV. Whereas it was stipulated by the second article in the treaty of peace of one thousand seven hundred and eighty-three, between His Britannic Majesty and the United States of America, that the boundary of the United States should comprehend all islands within twenty leagues of any part of the shores of the United States, and lying between lines to be drawn due east from the points where the aforesaid boundaries, between Nova Scotia on the one part, and East Florida on the other, shall respectively touch the Bay of Fundy and the Atlantic Ocean, excepting such islands as now are, or heretofore have been, within the limits of Nova Scotia; and whereas the several islands in the Bay of Passamaquoddy, which is part of the Bay of Fundy, and the island of Grand Menan, in the said Bay of Fundy, are claimed by the United States as being comprehended within their aforesaid boundaries, which said islands are claimed as belonging to His Britannic Majesty, as having been, at the time of and previous to the aforesaid treaty of one thousand seven hundred and eighty-three, within the limits of the Province of Nova Scotia: In order, therefore, finally to decide upon these claims, it is agreed that they shall be referred to two Commissioners to be appointed in the following manner, viz: One Commissioner shall be appointed by His Britannic Majesty, and one by the President of the United States, by and with the advice and consent of the Senate thereof; and the said two Commissioners so appointed shall be sworn impartially to examine and decide upon the said claims according to such evidence as shall be laid before them on the part of His Britannic Majesty and of the United States respectively. The said Commissioners shall meet at St. Andrews, in the Province of New Brunswick, and shall have power to adjourn to such other place or places as they shall think fit. The said Commissioners shall, by a declaration or report under their hands and seals, decide to which of the two contracting parties the several islands aforesaid do respectively belong, in conformity with the true intent of the said treaty of peace of one thousand seven hundred and eighty-three. And if the said Commissioners

shall agree in their decision, both parties shall consider such decision as final and conclusive. It is further agreed that, in event of the two Commissioners differing upon all or any of the matters so referred to them, or in the event of both or either of the said Commissioners refusing, or declining, or wilfully omitting to act as such, they shall make, jointly or separately, a report or reports, as well to the Government of His Britannic Majesty as to that of the United States, stating in detail the points on which they differ, and the grounds upon which their respective opinions have been formed, or the grounds upon which they, or either of them, have so refused, declined, or omitted to act. And His Britannic Majesty and the Government of the United States hereby agree to refer the report or reports of the said Commissioners to some friendly sovereign or State, to be then named for that purpose, and who shall be requested to decide on the differences which may be stated in the said report or reports, or upon the report of one Commissioner, together with the grounds upon which the other Commissioner shall have refused, declined or omitted to act, as the case may be. And if the Commissioner so refusing, declining or omitting to act, shall also wilfully omit to state the grounds upon which he has so done, in such manner that the said statement may be referred to such friendly sovereign or State, together with the report of such other Commissioner, then such sovereign or State shall decide *ex parte* upon the said report alone. And His Britannic Majesty and the Government of the United States engage to consider the decision of such friendly sovereign or State to be final and conclusive on all the matters so referred.

ARTICLE V. Whereas neither that point of the highlands lying due north from the source of the River St. Croix, and designated in the former treaty of peace between the two Powers as the northwest angle of Nova Scotia, nor the northwesternmost head of Connecticut River, has yet been ascertained; and whereas that part of the boundary line between the dominions of the two Powers which extends from the source of the River St. Croix directly north to the abovementioned northwest angle of Nova Scotia, thence along the said highlands which divide those rivers that empty themselves into the river St. Lawrence from those which fall into the Atlantic Ocean to the northwesternmost head of Connecticut River, thence down along the middle of that river to the forty-fifth degree of north latitude; thence by a line due west on said latitude until it strikes the river Iroquois or Cataraguy, has not yet been surveyed: it is agreed that for these several purposes two Commissioners shall be appointed, sworn and authorized to act exactly in the same manner directed with respect to those mentioned in the next preceding article, unless otherwise specified in the present article. The said Commissioners shall meet at St. Andrews, in the Province of New Brunswick, and shall have power to adjourn to such other place or places as they shall think fit. The said Commissioners shall have power to ascertain and determine the points abovementioned, in conformity with the provisions of the said treaty of peace of one thousand seven hundred and eighty-three, and shall cause the boundary aforesaid, from the source of the river St. Croix to the river Iroquois or Cataraguy, to be surveyed and marked according to the said provisions. The said Commissioners shall make a map of the said boundary, and annex to it a declaration under their hands and seals, certifying it to be the true

map of the said boundary, and particularizing the latitude and longitude of the northwest angle of Nova Scotia, of the northwesternmost head of Connecticut River, and of such other points of the said boundary as they may deem proper. And both parties agree to consider such map and declaration as finally and conclusively fixing the said boundary. And in the event of the said two Commissioners differing, or both or either of them refusing, declining, or wilfully omitting to act, such reports, declarations or statements shall be made by them, or either of them, and such reference to a friendly sovereign or State shall be made in all respects as in the latter part of the fourth article is contained, and in as full a manner as if the same was herein repeated.

ARTICLE VI. Whereas by the former treaty of peace that portion of the boundary of the United States from the point where the forty-fifth degree of north latitude strikes the river Iroquois or Cataraguy to the Lake Superior, was declared to be "along the middle of said river into Lake Ontario, through the middle of said lake, until it strikes the communication by water between that lake and Lake Erie, thence along the middle of said communication into Lake Erie, through the middle of said lake until it arrives at the water communication into the Lake Huron, thence through the middle of said lake to the water communication between that lake and Lake Superior;" and whereas doubts have arisen what was the middle of the said river, lakes and water communications, and whether certain islands lying in the same were within the dominions of His Britannic Majesty or of the United States: In order, therefore, finally to decide these doubts, they shall be referred to two Commissioners, to be appointed, sworn and authorized to act exactly in the manner directed with respect to those mentioned in the next preceding article, unless otherwise specified in this present article. The said Commissioners shall meet, in the first instance, at Albany, in the State of New York, and shall have power to adjourn to such other place or places as they shall think fit. The said Commissioners shall, by a report or declaration, under their hands and seals, designate the boundary through the said river, lakes and water communications, and decide to which of the two contracting parties the several islands lying within the said rivers, lakes and water communications, do respectively belong, in conformity with the true intent of the said treaty of one thousand seven hundred and eighty-three. And both parties agree to consider such designation and decision as final and conclusive. And in the event of the said two Commissioners differing, or both or either of them refusing, declining or wilfully omitting to act, such reports, declarations or statements shall be made by them, or either of them, and such reference to a friendly sovereign or State shall be made in all respects as in the latter part of the fourth article is contained, and in as full a manner as if the same was herein repeated.

ARTICLE VII. It is further agreed that the said two last-mentioned Commissioners, after they shall have executed the duties assigned to them in the preceding article, shall be, and they are hereby, authorized upon their oaths impartially to fix and determine, according to the true intent of the said treaty of peace of one thousand seven hundred and eighty-three, that part of the boundary between the dominions of the two Powers which extends from the water communication between Lake Huron and Lake Superior, to the most northwestern point of the Lake of the Woods,

to decide to which of the two parties the several islands lying in the lakes, water communications and rivers, forming the said boundary, do respectively belong, in conformity with the true intent of the said treaty of peace of one thousand seven hundred and eighty-three; and to cause such parts of the said boundary as require it to be surveyed and marked. The said Commissioners shall, by a report or declaration under their hands and seals, designate the boundary aforesaid, state their decision on the points thus referred to them, and particularize the latitude and longitude of the most northwestern point of the Lake of the Woods, and of such other parts of the said boundary as they may deem proper. And both parties agree to consider such designation and decision as final and conclusive. And in the event of the said two Commissioners differing, or both or either of them refusing, declining or wilfully omitting to act, such reports, declarations or statements shall be made by them, or either of them, and such reference to a friendly sovereign or State shall be made in all respects as in the latter part of the fourth article is contained, and in as full a manner as if the same was herein repeated.

ARTICLE VIII. The several boards of two Commissioners mentioned in the four preceding articles shall respectively have power to appoint a Secretary, and to employ such surveyors or other persons as they shall judge necessary. Duplicates of all their respective reports, declarations, statements and decisions and of their accounts, and of the journal of their proceedings, shall be delivered by them to the agents of His Britannic Majesty and to the agents of the United States, who may be respectively appointed and authorized to manage the business on behalf of their respective Governments. The said Commissioners shall be respectively paid in such manner as shall be agreed between the two contracting parties, such agreement being to be settled at the time of the exchange of the ratifications of this treaty. And all other expenses attending the said Commissions shall be defrayed equally by the two parties. And in the case of death, sickness, resignation or necessary absence, the place of every such Commissioner, respectively, shall be supplied in the same manner as such Commissioner was first appointed, and the new Commissioner shall take the same oath or affirmation, and do the same duties. It is further agreed between the two contracting parties, that in case any of the islands mentioned in any of the preceding articles, which were in the possession of one of the parties prior to the commencement of the present war between the two countries, should, by the decision of any of the Boards of Commissioners aforesaid, or of the sovereign or State so referred to, as in the four next preceding articles contained, fall within the dominions of the other party, all grants of land made previous to the commencement of the war, by the party having had such possession, shall be as valid as if such island or islands had, by such decision or decisions, been adjudged to be within the dominions of the party having had such possession.

\* \* \* \* \*

ARTICLE XI. This treaty, when the same shall have been ratified on both sides, without alteration by either of the contracting parties, and the ratifications mutually exchanged, shall be binding on both parties, and the ratifications shall be exchanged at Washington, in the space of four months from this day, or sooner if practicable.



In faith whereof we, the respective Plenipotentiaries, have signed this treaty, and have thereunto affixed our seals.

Done, in triplicate, at Ghent, the twenty-fourth day of December, one thousand eight hundred and fourteen.

[SEAL.]  
[SEAL.]  
[SEAL.]  
[SEAL.]  
[SEAL.]  
[SEAL.]  
[SEAL.]

GAMBIER.  
HENRY GOULBURN.  
WILLIAM ADAMS.  
JOHN QUINCY ADAMS.  
J. A. BAYARD.  
H. CLAY.  
JONA. RUSSELL.  
ALBERT GALLATIN.

*Convention respecting fisheries, boundary, and restoration of slaves.*

[Concluded October 20, 1818; ratifications exchanged at Washington January, 30, 1819; proclaimed January 30, 1819.]

The United States of America, and His Majesty the King of the United Kingdom of Great Britain and Ireland, desirous to cement the good understanding which happily subsists between them, have, for that purpose, named their respective Plenipotentiaries, that is to say:

The President of the United States, on his part, has appointed, Albert Gallatin, their Envoy Extraordinary and Minister Plenipotentiary to the Court of France; and Richard Rush, their Envoy Extraordinary and Minister Plenipotentiary to the Court of His Britannic Majesty:—and His Majesty has appointed the Right Honorable Frederick John Robinson, Treasurer of His Majesty's Navy, and President of the Committee of Privy Council for Trade and Plantations; and Henry Goulburn Esq., one of His Majesty's Under Secretaries of State:—

Who, after having exchanged their respective full powers, found to be in due and proper form, have agreed to and concluded the following articles.

ARTICLE V. Whereas it was agreed by the first article of the treaty of Ghent, that "all territory, places, possessions whatsoever taken by either party from the other during the war, or which may be taken after the signing of this treaty, excepting only the islands hereinafter mentioned, shall be restored without delay; and without causing any destruction, or carrying away any of the artillery or other public property originally captured in the said forts or places which shall remain therein upon the exchange of the ratifications of this treaty, or any slaves or other private property;" and whereas under the aforesaid article the United States claim for their citizens, and as their private property, the restitution of, or full compensation for all slaves who, at the date of the exchange of the ratifications of the said treaty, were in any territory, places, or possessions whatsoever directed by the said treaty to be restored to the United States, but then still occupied by the British forces, whether such slaves were, at the date aforesaid, on shore, or on board any British vessel lying in waters within the territory or jurisdiction of the United States; and whereas differences have arisen whether, by the true intent and meaning of the aforesaid article of the treaty of Ghent, the United States are entitled

to the restitution of, or full compensation for all or any slaves as above described, the high contracting parties hereby agree to refer the said differences to some friendly sovereign or State to be named for that purpose; and the high contracting parties further engage to consider the decision of such friendly sovereign or State, to be final and conclusive on all the matters referred.

ARTICLE VI. This convention, when the same shall have been duly ratified by the President of the United States, by and with the advice and consent of their Senate, and by His Britannic Majesty, and the respective ratifications mutually exchanged, shall be binding and obligatory on the said United States and on His Majesty; and the ratifications shall be exchanged in six months from this date, or sooner, if possible.

In witness whereof the respective Plenipotentiaries have signed the same, and have thereunto affixed the seal of their arms.

Done at London this twentieth day of October, in the year of our Lord one thousand eight hundred and eighteen.

[SEAL.]

ALBERT GALLATIN.

[SEAL.]

RICHARD RUSH.

[SEAL.]

FREDERICK JOHN ROBINSON.

[SEAL.]

HENRY GOULBURN.

*Convention for indemnity under award of Emperor of Russia as to true construction of first article of treaty of December 24, 1814.*

[Concluded June 30 (July 12), 1822; ratifications exchanged at Washington January 10, 1823; proclaimed January 11, 1823.]

In the name of the Most Holy and Indivisible Trinity.

The President of the United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland, having agreed, in pursuance of the fifth article of the convention concluded at London on the 20th day of October, 1818, to refer the differences which had arisen between the two Governments, upon the true construction and meaning of the first article of the treaty of peace and amity concluded at Ghent on the 24th day of December, 1814, to the friendly arbitration of His Majesty the Emperor of all the Russias, mutually engaging to consider his decision as final and conclusive. And his said Imperial Majesty having, after due consideration, given his decision upon these differences in the following terms, to wit:

"That the United States of America are entitled to claim from Great Britain a just indemnification for all private property which the British forces may have carried away; and, as the question relates to slaves more especially, for all the slaves that the British forces may have carried away from places and territories of which the treaty stipulates the restitution, in quitting these same places and territories.

"That the United States are entitled to consider as having been so carried away, all such slaves as may have been transferred from the above-mentioned territories to British vessels within the waters of the said territories, and who for this reason may not have been restored.

"But that if there should be any American slaves who were carried away from territories of which the first article of the treaty of Ghent has not stipulated the restitution to the United States, the United States are not entitled to claim an indemnification for the said slaves."

Now, for the purpose of carrying into effect this award of His Imperial Majesty, as arbitrator, his good offices have been farther invoked to assist in framing such convention or articles of agreement between the United States of America and his Britannic Majesty as shall provide the mode of ascertaining and determining the value of slaves and of other private property, which may have been carried away in contravention of the treaty of Ghent, and for which indemnification is to be made to the citizens of the United States, in virtue of His Imperial Majesty's said award, and shall secure compensation to the sufferers for their losses, so ascertained and determined. And His Imperial Majesty has consented to lend his mediation for the above purpose, and has constituted and appointed Charles Robert Count Nesselrode, His Imperial Majesty's Privy Counsellor, member of the Council of State, Secretary of State directing the Imperial Department of Foreign Affairs, Chamberlain, Knight of the Order of St. Alexander Nevsky, Grand Cross of the Order of St. Vladimir of the first class, Knight of that of the White Eagle of Poland, Grand Cross of the Order of St. Stephen of Hungary, of the Black and of the Red Eagle of Prussia, of the Legion of Honor of France, of Charles III of Spain, of St. Ferdinand and of Merit of Naples, of the Annunciation of Sardinia, of the Polar Star of Sweden, of the Elephant of Denmark, of the Golden Eagle of Wirtemberg, of Fidelity of Baden, of St. Constantine of Parma, and of Guelph of Hannover; and John Count Capodistrias, His Imperial Majesty's Privy Counsellor, and Secretary of State, Knight of the Order of St. Alexander Nevsky, Grand Cross of the Order of St. Vladimir of the first class, Knight of that of the White Eagle of Poland, Grand Cross of the Order of St. Stephen of Hungary, of the Black and of the Red Eagle of Prussia, of the Legion of Honour of France, of Charles III of Spain, of St. Ferdinand and of Merit of Naples, of St. Maurice and of St. Lazarus of Sardinia, of the Elephant of Denmark, of Fidelity and of the Lion of Zahringen of Baden, Burgher of the Canton of Vaud, and also of the Canton and of the Republic of Geneva, as his Plenipotentiaries to treat, adjust, and conclude such articles of agreement as may tend to the attainment of the above-mentioned end, with the Plenipotentiaries of the United States and of His Britannic Majesty, that is to say:

On the part of the President of the United States, with the advice and consent of the Senate thereof, Henry Middleton, a citizen of the said United States, and their Envoy Extraordinary and Minister Plenipotentiary to His Majesty the Emperor of all the Russias; and on the part of His Majesty the King of the United Kingdom of Great Britain and Ireland, the Right Honorable Sir Charles Bagot, one of His Majesty's most Honorable Privy Council, Knight Grand Cross of the most honorable Order of the Bath, and His Majesty's Ambassador Extraordinary and Plenipotentiary to His Majesty the Emperor of all the Russias;

And the said Plenipotentiaries, after a reciprocal communication of their respective full powers, found in good and due form, have agreed upon the following articles:

ARTICLE I. For the purpose of ascertaining and determining the amount of indemnification which may be due to citizens of the United States under the decision of His Imperial Majesty, two Commissioners and two

Arbitrators shall be appointed in the manner following, that is to say: One Commissioner and one Arbitrator shall be nominated and appointed by the President of the United States of America, by and with the advice and consent of the Senate thereof; and one Commissioner and one Arbitrator shall be appointed by His Britannic Majesty. And the two Commissioners and two Arbitrators, thus appointed, shall meet and hold their sittings as a board in the city of Washington. They shall have power to appoint a secretary, and before proceeding to the other business of the commission, they shall, respectively, take the following oath (or affirmation) in the presence of each other; which oath or affirmation, being so taken, and duly attested, shall be entered on the record of their proceedings, that is to say: "I, A. B., one of the Commissioners (or Arbitrators, as the case may be) appointed in pursuance of the convention concluded at St. Petersburg on the <sup>30th</sup><sub>1st</sub> day of <sup>June,</sup><sub>July,</sub> one thousand eight hundred and twenty-two, between His Majesty the Emperor of all the Russias, the United States of America, and His Britannic Majesty, do solemnly swear (or affirm) that I will diligently, impartially, and carefully examine, and, to the best of my judgment, according to justice and equity, decide all matters submitted to me as Commissioner (or Arbitrator, as the case may be) under the said convention."

All vacancies occurring by death or otherwise shall be filled up in the manner of the original appointment, and the new Commissioners or Arbitrators shall take the same oath or affirmation, and perform the same duties.

ARTICLE II. If, at the first meeting of this board, the Governments of the United States and of Great Britain shall not have agreed upon an average value, to be allowed as compensation for each slave for whom indemnification may be due; then, and in that case, the Commissioners and Arbitrators shall conjointly proceed to examine the testimony which shall be produced under the authority of the President of the United States, together with such other competent testimony as they may see cause to require or allow, going to prove the true value of slaves at the period of the exchange of the ratifications of the treaty of Ghent; and, upon the evidence so obtained, they shall agree upon and fix the average value. But in case that the majority of the board of Commissioners and Arbitrators should not be able to agree respecting such average value, then, and in that case, recourse shall be had to the arbitration of the Minister or other Agent of the mediating Power accredited to the Government of the United States. A statement of the evidence produced, and of the proceedings of the board thereupon, shall be communicated to the said Minister or Agent, and his decision, founded upon such evidence and proceedings, shall be final and conclusive. And the said average value, when fixed and determined by either of the three before-mentioned methods, shall, in all cases, serve as a rule for the compensation to be awarded for each and every slave, for whom it may afterwards be found that indemnification is due.

ARTICLE III. When the average value of slaves shall have been ascertained and fixed, the two Commissioners shall constitute a board for the examination of the claims which are to be submitted to them, and they shall notify to the Secretary of State of the United States that they are ready to receive a definite list of the slaves and other private property

for which the citizens of the United States claim indemnification; it being understood and hereby agreed that the commission shall not take cognizance of, nor receive, and that His Britannic Majesty shall not be required to make, compensation for any claims for private property under the first article of the treaty of Ghent not contained in the said list. And His Britannic Majesty hereby engages to cause to be produced before the commission, as material towards ascertaining facts, all the evidence of which His Majesty's Government may be in possession, by returns from His Majesty's officers or otherwise, of the number of slaves carried away. But the evidence so produced, or its defectiveness, shall not go in bar of any claim or claims which shall be otherwise satisfactorily authenticated.

ARTICLE IV. The two Commissioners are hereby empowered and required to go into an examination of all the claims submitted, thro' the above-mentioned list, by the owners of slaves or other property, or by their lawful attorneys or representatives, and to determine the same, respectively, according to the merits of the several cases, under the rule of the Imperial decision hereinabove recited, and having reference, if need there be, to the explanatory documents hereunto annexed, marked A and B. And, in considering such claims, the Commissioners are empowered and required to examine, on oath or affirmation, all such persons as shall come before them touching the real number of the slaves, or value of other property, for which indemnification is claimed; and, also, to receive in evidence, according as they may think consistent with equity and justice, written depositions or papers, such depositions or papers being duly authenticated, either according to existing legal forms, or in such other manner as the said Commissioners shall see cause to require or allow.

ARTICLE V. In the event of the two Commissioners not agreeing in any particular case under examination, or of their disagreement upon any question which may result from the stipulations of this convention, then and in that case they shall draw by lot the name of one of the two Arbitrators, who, after having given due consideration to the matter contested, shall consult with the Commissioners; and a final decision shall be given, conformably to the opinion of the majority of the two Commissioners and of the Arbitrator so drawn by lot. And the Arbitrator, when so acting with the two Commissioners, shall be bound in all respects by the rules of proceeding enjoined by the IVth article of this convention upon the Commissioners, and shall be vested with the same powers, and be deemed, for that case, a Commissioner.

ARTICLE VI. The decision of the two Commissioners, or of the majority of the board, as constituted by the preceding article, shall in all cases be final and conclusive, whether as to number, the value, or the ownership of the slaves, or other property, for which indemnification is to be made. And His Britannic Majesty engages to cause the sum awarded to each and every owner in lieu of his slave or slaves, or other property, to be paid in specie, without deduction, at such time or times and at such place or places as shall be awarded by the said Commissioners, and on condition of such releases or assignments to be given as they shall direct: Provided, that no such payment shall be fixed to take place sooner than twelve months from the day of the exchange of the ratifications of this convention.

ARTICLE VII. It is farther agreed that the Commissioners and Arbitrators shall be respectively paid in such manner as shall be settled between

the Governments of the United States and Great Britain at the time of the exchange of the ratifications of this convention. And all other expenses attending the execution of the commission shall be defrayed jointly by the United States and His Britannic Majesty, the same being previously ascertained and allowed by the majority of the board.

ARTICLE VIII. A certified copy of this convention, when duly ratified by His Majesty the Emperor of all the Russias, by the President of the United States, by and with the advice and consent of their Senate, and by His Britannic Majesty, shall be delivered by each of the contracting parties, respectively, to the Minister or other Agent of the mediating Power accredited to the Government of the United States, as soon as may be after the ratifications shall have been exchanged; which last shall be effected at Washington in six months from the date hereof, or sooner if possible.

In faith whereof, the respective Plenipotentiaries have signed this convention, drawn up in two languages, and have hereunto affixed their seals.

Done in triplicate at St. Petersburg, this thirtieth (twelfth) day of June (July) one thousand eight hundred and twenty-two.

[SEAL.]

NESSERLODE.

[SEAL.]

CAPODISTRIAS.

[SEAL.]

HENRY MIDDLETON.

[SEAL.]

CHARLES BAGOT.

*Convention relative to indemnity under convention of July 12, 1822.*

[Concluded November 13, 1826; ratifications exchanged at London February 6, 1827; proclaimed March 19, 1827.]

Difficulties having arisen in the execution of the convention concluded at St. Petersburg on the twelfth day of July 1822, under the mediation of His Majesty the Emperor of all the Russias, between the United States of America and Great Britain, for the purpose of carrying into effect the decision of His Imperial Majesty upon the differences which had arisen between the said United States and Great Britain on the true construction and meaning of the first article of the treaty of peace and amity concluded at Ghent on the twenty-fourth day of December 1814: The said United States and His Britannick Majesty, being equally desirous to obviate such difficulties, have respectfully named Plenipotentiaries to treat and agree respecting the same, that is to say:

The President of the United States of America has appointed Albert Gallatin their Envoy Extraordinary and Minister Plenipotentiary to His Britannick Majesty; and His Majesty the King of the United Kingdom of Great Britain and Ireland, the Right Honourable William Huskisson, a member of his said Majesty's Most Honourable Privy Council, a member of Parliament, President of the Committee of Privy Council for Affairs of Trade and Foreign Plantations, and Treasurer of his said Majesty's Navy, and Henry Unwin Addington, Esquire, late His Majesty's Chargé d'Affaires to the United States of America;

Who, after having communicated to each other their respective full powers, found to be in due and proper form, have agreed upon and concluded the following articles:

ARTICLE I. His Majesty the King of the United Kingdom of Great Britain and Ireland agrees to pay, and the United States of America agree to receive, for the use of the persons entitled to indemnification and compen-

sation by virtue of the said decision and convention, the sum of twelve hundred and four thousand nine hundred and sixty dollars, current money of the United States, in lieu of, and in full and complete satisfaction for, all sums claimed or claimable from Great Britain, by any person or persons whatsoever, under the said decision and convention.

ARTICLE II. The object of the said convention being thus fulfilled, that convention is hereby declared to be cancelled and annulled, save and except the second article of the same, which has already been carried into execution by the Commissioners appointed under the said convention;— and save and except so much of the third article of the same as relates to the definitive list of claims and has already likewise been carried into execution by the said Commissioners.

ARTICLE III. The said sum of twelve hundred and four thousand nine hundred and sixty dollars shall be paid at Washington to such person or persons as shall be duly authorized, on the part of the United States, to receive the same, in two equal payments as follows:

The payment of the first half to be made twenty days after official notification shall have been made by the Government of the United States to His Britannick Majesty's Minister in the said United States of the ratification of the present convention by the President of the United States, by and with the advice and consent of the Senate thereof.

And the payment of the second half to be made on the first day of August 1827.

ARTICLE IV. The above sums being taken as a full and final liquidation of all claims whatsoever arising under the said decision and convention, both the final adjustment of those claims, and the distribution of the sums so paid by Great Britain to the United States, shall be made in such manner as the United States alone shall determine; and the Government of Great Britain shall have no further concern or liability therein.

ARTICLE V. It is agreed that from the date of the exchange of the ratifications of the present convention, the joint commission appointed under the said convention of St. Petersburg, of the twelfth of July 1822, shall be dissolved; and upon the dissolution thereof, all the documents and papers in possession of the said commission, relating to claims under that convention, shall be delivered over to such person or persons as shall be duly authorized on the part of the United States to receive the same. And the British Commissioner shall make over to such person or persons, so authorized, all the documents and papers (or authenticated copies of the same, where the originals cannot conveniently be made over) relating to claims under the said convention, which he may have received from his Government for the use of the said commission, conformably to the stipulations contained in the third article of the said convention.

ARTICLE VI. The present convention shall be ratified, and the ratifications shall be exchanged in London, in six months from this date, or sooner if possible.

In witness whereof the Plenipotentiaries aforesaid, by virtue of their respective full powers, have signed the same, and have affixed thereunto the seals of their arms.

Done at London this thirteenth day of November, in the year of our Lord one thousand eight hundred and twenty-six.

[SEAL.]

[SEAL.]

[SEAL.]

ALBERT GALLATIN.

WILLIAM HUSKISSON.

HENRY UNWIN ADDINGTON.

*Convention providing for the submission to arbitration the dispute concerning the northeastern boundary.*

[Concluded September 29, 1827; ratifications exchanged at London April 2, 1828; proclaimed May 15, 1828.]

Whereas it is provided by the fifth article of the treaty of Ghent, that, in case the Commissioners appointed under that article, for the settlement of the boundary line therein described, should not be able to agree upon such boundary line, the report or reports of those Commissioners, stating the points on which they had differed, should be submitted to some friendly Sovereign or State, and that the decision given by such Sovereign or State, on such points of difference, should be considered by the contracting parties as final and conclusive: That case having now arisen, and it having, therefore, become expedient to proceed to and regulate the reference as above described, the United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland have, for that purpose, named their Plenipotentiaries, that is to say:

The President of the United States has appointed Albert Gallatin, their Envoy Extraordinary and Minister Plenipotentiary at the Court of His Britannick Majesty; and His said Majesty, on his part, has appointed the Right Honourable Charles Grant, a member of Parliament, a member of His said Majesty's Most Honourable Privy Council, and President of the Committee of the Privy Council for Affairs of Trade and Foreign Plantations, and Henry Unwin Addington, Esquire;

Who, after having exchanged their respective full powers, found to be in due and proper form, have agreed to and concluded the following articles:

**ARTICLE I.** It is agreed that the points of difference which have arisen in the settlement of the boundary between the American and British dominions, as described in the 5th article of the treaty of Ghent, shall be referred, as therein provided, to some friendly Sovereign or State, who shall be invited to investigate, and make a decision upon, such points of difference.

The two contracting Powers engage to proceed in concert, to the choice of such friendly Sovereign or State, as soon as the ratifications of this convention shall have been exchanged, and to use their best endeavours to obtain a decision, if practicable, within two years after the Arbitrator shall have signified his consent to act as such.

**ARTICLE II.** The reports and documents, thereunto annexed, of the Commissioners appointed to carry into execution the 5th article of the treaty of Ghent, being so voluminous and complicated as to render it improbable that any Sovereign or State should be willing or able to undertake the office of investigating and arbitrating upon them, it is hereby agreed to substitute, for those reports, new and separate statements of the respective cases, severally drawn up by each of the contracting parties, in such form and terms as each may think fit.

The said statements, when prepared, shall be mutually communicated to each other by the contracting parties, that is to say, by the United States to His Britannick Majesty's Minister or Chargé d'Affaires at Washington, and by Great Britain to the Minister or Chargé d'Affaires of the United States at London, within fifteen months after the exchange of the ratifications of the present convention.



After such communication shall have taken place, each party shall have the power of drawing up a second and definitive statement, if it thinks fit so to do, in reply to the statement of the other party, so communicated, which definitive statements shall also be mutually communicated, in the same manner as aforesaid, to each other, by the contracting parties, within twenty-one months after the exchange of ratifications of the present convention.

ARTICLE III. Each of the contracting parties shall, within nine months after the exchange of ratifications of this convention, communicate to the other, in the same manner as aforesaid, all the evidence intended to be brought in support of its claim, beyond that which is contained in the reports of the Commissioners, or papers thereunto annexed, and other written documents laid before the Commission, under the 5th article of the treaty of Ghent.

Each of the contracting parties shall be bound, on the application of the other party, made within six months after the exchange of the ratifications of this convention, to give authentick copies of such individually specified acts of a publick nature, relating to the territory in question, intended to be laid as evidence before the Arbiter, as have been issued under the authority, or are in the exclusive possession, of each party.

No maps, surveys, or topographical evidence of any description, shall be adduced by either party, beyond that which is hereinafter stipulated, nor shall any fresh evidence of any description be adduced or adverted to, by either party, other than that mutually communicated or applied for as aforesaid.

Each party shall have full power to incorporate in, or annex to, either its first or second statement, any portion of the reports of the Commissioners, or papers thereunto annexed, and other written documents laid before the Commission under the 5th article of the treaty of Ghent, or of the other evidence mutually communicated or applied for as above provided, which it may think fit.

ARTICLE IV. The map called Mitchell's map, by which the framers of the treaty of 1783 are acknowledged to have regulated their joint and official proceedings, and the map A, which has been agreed on by the contracting parties, as a delineation of the water-courses, and of the boundary lines in reference to the said water-courses, as contended for by each party respectively, which has accordingly been signed by the above-named Plenipotentiaries, at the same time with this convention, shall be annexed to the statements of the contracting parties, and be the only maps that shall be considered as evidence, mutually acknowledged by the contracting parties, of the topography of the country.

It shall, however, be lawful for either party to annex to its respective first statement, for the purposes of general illustration, any of the maps, surveys, or topographical delineations, which were filed by the Commissioners under the 5th article of the treaty of Ghent, any engraved map heretofore published, and also a transcript of the above-mentioned map A, or of a section thereof, in which transcript each party may lay down the highlands, or other features of the country, as it shall think fit; the water courses and the boundary lines, as claimed by each party, remaining as laid down in the said map A.

But this transcript, as well as all the other maps, surveys, or topographical delineations, other than the map A, and Mitchell's map, intended to be thus annexed, by either party, to the respective statements, shall be communicated to the other party, in the same manner as aforesaid, within nine months after the exchange of the ratifications of this convention, and shall be subject to such objections and observations as the other contracting party may deem it expedient to make thereto, and shall annex to his first statement, either in the margin of such transcript, map or maps, or otherwise.

ARTICLE V. All the statements, papers, maps, and documents, above mentioned, and which shall have been mutually communicated as aforesaid, shall, without any addition, subtraction, or alteration, whatsoever, be jointly and simultaneously delivered in to the arbitrating Sovereign or State within two years after the exchange of ratifications of this convention, unless the Arbiter should not, within that time, have consented to act as such; in which case all the said statements, papers, maps, and documents shall be laid before him within six months after the time when he shall have consented so to act. No other statements, papers, maps, or documents shall ever be laid before the Arbiter, except as hereinafter provided.

ARTICLE VI. In order to facilitate the attainment of a just and sound decision on the part of the Arbiter, it is agreed that, in case the said Arbiter should desire further elucidation or evidence in regard to any specific point contained in any of the said statements submitted to him, the requisition for such elucidation or evidence shall be simultaneously made to both parties, who shall thereupon be permitted to bring further evidence, if required, and to make, each, a written reply to the specific questions submitted by the said Arbiter, but no further; and such evidence and replies shall be immediately communicated by each party to the other.

And in case the Arbiter should find the topographical evidence, laid as aforesaid before him, insufficient for the purposes of a sound and just decision, he shall have the power of ordering additional surveys to be made of any portions of the disputed boundary line or territory, as he may think fit; which surveys shall be made at the joint expense of the contracting parties, and be considered as conclusive by them.

ARTICLE VII. The decision of the Arbiter, when given, shall be taken as final and conclusive; and it shall be carried, without reserve, into immediate effect, by Commissioners appointed for that purpose by the contracting parties.

ARTICLE VIII. This convention shall be ratified, and the ratifications shall be exchanged in nine months from the date hereof, or sooner if possible.

In witness whereof, we, the respective Plenipotentiaries, have signed the same, and have affixed thereto the seals of our arms.

Done at London the twenty-ninth day of September, in the year of our Lord one thousand eight hundred and twenty-seven.

[SEAL.]

ALBERT GALLATIN.

[SEAL.]

CHA. GRANT.

[SEAL.]

HENRY UNWIN ADDINGTON.

*Convention for the settlement of claims.*

[Concluded February 8, 1853; ratifications exchanged at London July 26, 1853; proclaimed August 20, 1853.]

Whereas claims have at various times since the signature of the treaty of peace and friendship between the United States of America and Great Britain, concluded at Ghent on the 24th of December 1814, been made upon the Government of the United States on the part of corporations, companies, and private individuals, subjects of Her Britannic Majesty, and upon the Government of Her Britannic Majesty on the part of corporations, companies, and private individuals, citizens of the United States; and whereas some of such claims are still pending, and remain unsettled: The President of the United States of America, and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, being of opinion that a speedy and equitable settlement of all such claims will contribute much to the maintenance of the friendly feelings which subsist between the two countries, have resolved to make arrangements for that purpose by means of a Convention, and have named as their Plenipotentiaries to confer and agree thereupon, that is to say:

The President of the United States of America, Joseph Reed Ingersoll, Envoy Extraordinary and Minister Plenipotentiary of the United States to Her Britannic Majesty; and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, the Right Honourable John Russell, (commonly called Lord John Russell,) a member of Her Britannic Majesty's Most Honourable Privy Council, a member of Parliament, and Her Britannic Majesty's Principal Secretary of State for Foreign Affairs;

Who, after having communicated to each other their respective full powers, found in good and due form, have agreed as follows:

ARTICLE I. The high contracting parties agree that all claims on the part of corporations, companies, or private individuals, citizens of the United States upon the Government of Her Britannic Majesty, and all claims on the part of corporations, companies, or private individuals, subjects of Her Britannic Majesty, upon the Government of the United States, which may have been presented to either Government for its interposition with the other since the signature of the treaty of peace and friendship concluded between the United States of America and Great Britain, at Ghent, on the 24th of December 1814, and which yet remained unsettled, as well as any other such claims which may be presented within the time specified in Article III, hereinafter, shall be referred to two Commissioners, to be appointed in the following manner, that is to say: One Commissioner shall be named by the President of the United States, and one by Her Britannic Majesty. In case of the death, absence, or incapacity of either Commissioner, or in the event of either Commissioner omitting or ceasing to act as such, the President of the United States, or Her Britannic Majesty, respectively, shall forthwith name another person to act as Commissioner in the place or stead of the Commissioner originally named.

The Commissioners so named shall meet at London at the earliest convenient period after they shall have been respectively named; and shall, before proceeding to any business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the

best of their judgment, and according to justice and equity, without fear, favor, or affection to their own country, upon all such claims as shall be laid before them on the part of the Governments of the United States and of Her Britannic Majesty, respectively; and such declaration shall be entered on the record of their proceedings.

The Commissioners shall then, and before proceeding to any other business, name some third person to act as an Arbitrator or Umpire in any case or cases on which they may themselves differ in opinion. If they should not be able to agree upon the name of such third person, they shall each name a person; and in each and every case in which the Commissioners may differ in opinion as to the decision which they ought to give, it shall be determined by lot which of the two persons so named shall be the Arbitrator or Umpire in that particular case. The person or persons so to be chosen to be Arbitrator or Umpire shall, before proceeding to act as such in any case, make and subscribe a solemn declaration in a form similar to that which shall already have been made and subscribed by the Commissioners, which shall be entered on the record of their proceedings. In the event of the death, absence, or incapacity of such person or persons, or of his or their omitting, or declining, or ceasing to act as such Arbitrator or Umpire, another and different person shall be named as aforesaid to act as such Arbitrator or Umpire in the place and stead of the person so originally named as aforesaid, and shall make and subscribe such declaration as aforesaid.

ARTICLE II. The Commissioners shall then forthwith conjointly proceed to the investigation of the claims which shall be presented to their notice. They shall investigate and decide upon such claims in such order and in such manner as they may conjointly think proper, but upon such evidence or information only as shall be furnished by or on behalf of their respective Governments. They shall be bound to receive and peruse all written documents or statements which may be presented to them by or on behalf of their respective Governments, in support of, or in answer to, any claim; and to hear, if required, one person on each side, on behalf of each Government, as counsel or agent for such Government, on each and every separate claim. Should they fail to agree in opinion upon any individual claim, they shall call to their assistance the Arbitrator or Umpire whom they may have agreed to name, or who may be determined by lot, as the case may be; and such Arbitrator or Umpire, after having examined the evidence adduced for and against the claim, and after having heard, if required, one person on each side as aforesaid, and consulted with the Commissioners, shall decide thereupon finally, and without appeal. The decision of the Commissioners, and of the Arbitrator or Umpire, shall be given upon each claim in writing, and shall be signed by them respectively. It shall be competent for each Government to name one person to attend the Commissioners as agent on its behalf, to present and support claims on its behalf, and to answer claims made upon it, and to represent it generally in all matters connected with the investigation and decision thereof.

The President of the United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland hereby solemnly and sincerely engage to consider the decision of the Commissioners conjointly, or of the Arbitrator or Umpire, as the case may be, as

absolutely final and conclusive upon each claim decided upon by them or him, respectively, and to give full effect to such decisions without any objection, evasion, or delay whatsoever.

It is agreed that no claim arising out of any transaction of a date prior to the 24th of December 1814 shall be admissible under this convention.

ARTICLE III. Every claim shall be presented to the Commissioners within six months from the day of their first meeting, unless in any case where reasons for delay shall be established to the satisfaction of the Commissioners, or of the Arbitrator or Umpire, in the event of the Commissioners differing in opinion thereupon; and then, and in any such case, the period for presenting the claim may be extended to any time not exceeding three months longer.

The Commissioners shall be bound to examine and decide upon every claim within one year from the day of their first meeting. It shall be competent for the Commissioners conjointly, or for the Arbitrator or Umpire, if they differ, to decide in each case whether any claim has or has not been duly made, preferred, or laid before them, either wholly, or to any and what extent, according to the true intent and meaning of this convention.

ARTICLE IV. All sums of money which may be awarded by the Commissioners, or by the Arbitrator or Umpire, on account of any claim, shall be paid by the one Government to the other, as the case may be, within twelve months after the date of the decision, without interest, and without any deduction, save as specified in Article VI. hereinafter.

ARTICLE V. The high contracting parties engage to consider the result of the proceedings of this commission as a full, perfect, and final settlement of every claim upon either Government arising out of any transaction of a date prior to the exchange of the ratifications of the present convention; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, preferred, or laid before the said commission, shall, from and after the conclusion of the proceedings of the said commission, be considered and treated as finally settled, barred, and thenceforth inadmissible.

ARTICLE VI. The Commissioners, and the Arbitrator or Umpire, shall keep an accurate record and correct minutes or notes of all their proceedings, with the dates thereof, and shall appoint and employ a clerk, or other persons, to assist them in the transaction of the business which may come before them.

Each Government shall pay to its Commissioner an amount of salary not exceeding three thousand dollars, or six hundred and twenty pounds sterling, a year, which amount shall be the same for both Governments.

The amount of salary to be paid to the Arbitrator (or Arbitrators, as the case may be) shall be determined by mutual consent at the close of the commission.

The salary of the clerk shall not exceed the sum of fifteen hundred dollars, or three hundred and ten pounds sterling, a year.

The whole expenses of the commission, including contingent expenses, shall be defrayed by a rateable deduction on the amount of the sums awarded by the commission; provided always that such deduction shall not exceed the rate of five per cent. on the sums so awarded.

The deficiency, if any, shall be defrayed in moieties by the two Governments.

ARTICLE VII. The present convention shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by Her Britannic Majesty; and the ratifications shall be exchanged at London as soon as may be within twelve months from the date hereof.

In witness whereof the respective Plenipotentiaries have signed the same, and have affixed thereto the seals of their arms.

Done at London the eighth day of February, in the year of our Lord one thousand eight hundred and fifty-three.

[SEAL.]

J. R. INGERSOLL.

[SEAL.]

J. RUSSELL.

*Convention extending duration of claims commission under the convention of February 8, 1853.*

[Concluded July 17, 1854; ratifications exchanged at London August 18, 1854; proclaimed September 11, 1854.]

Whereas a convention was concluded on the 8th day of February, 1853, between the United States of America and Her Britannic Majesty, for the settlement of outstanding claims, by a mixed commission, limited to endure for twelve months from the day of the first meeting of the Commissioners; and whereas doubts have arisen as to the practicability of the business of the said commission being concluded within the period assigned, the President of the United States, and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, are desirous that the time originally fixed for the duration of the commission should be extended, and to this end have named plenipotentiaries to agree upon the best mode of effecting this object, that is to say: The President of the United States, the Honorable William L. Marcy, Secretary of State of the United States, and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, John Fiennes Crampton, Esq're, Her Majesty's Envoy Extraordinary and Minister Plenipotentiary at Washington; who have agreed as follows:

ARTICLE I. The high contracting parties agree that the time limited in the convention above referred to for the termination of the commission shall be extended for a period not exceeding four months from the 15th of September next, should such extension be deemed necessary by the Commissioners, or the Umpire in case of their disagreement; it being agreed that nothing contained in this article shall in anywise alter or extend the time originally fixed in the said convention for the presentation of claims to the Commissioners.

ARTICLE II. The present convention shall be ratified, and the ratifications shall be exchanged at London, as soon as possible within four months from the date thereof.

In witness whereof the respective Plenipotentiaries have signed the same, and have affixed thereto the seals of their arms.

Done at Washington the seventeenth day of July, in the year of our Lord one thousand eight hundred and fifty-four.

[SEAL.]

W. L. MARCY.

[SEAL.]

JOHN F. CRAMPTON.

*Treaty extending the right of fishing and regulating commerce and navigation between the United States and the British possessions in North America.*

[Concluded June 5, 1854; ratifications exchanged at Washington September 9, 1854; proclaimed September 11, 1854.]

The Government of the United States being equally desirous with Her Majesty the Queen of Great Britain to avoid further misunderstanding between their respective citizens and subjects in regard to the extent of the right of fishing on the coasts of British North America, secured to each by Article I. of a convention between the United States and Great Britain signed at London on the 20th day of October 1818; and being also desirous to regulate the commerce and navigation between their respective territories and people, and more especially between Her Majesty's possessions in North America and the United States, in such manner as to render the same reciprocally beneficial and satisfactory, have, respectively, named Plenipotentiaries to confer and agree thereupon, that is to say:

The President of the United States of America, William L. Marcy, Secretary of State of the United States, and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, James, Earl of Elgin and Kincardine, Lord Bruce and Elgin, a peer of the United Kingdom, Knight of the most ancient and most noble Order of the Thistle, and Governor General in and over all Her Britannic Majesty's provinces on the continent of North America, and in and over the Island of Prince Edward;

Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon the following articles:

ARTICLE I. It is agreed by the high contracting parties that in addition to the liberty secured to the United States fishermen by the above-mentioned convention of October 20, 1818, of taking, curing, and drying fish on certain coasts of the British North American Colonies therein defined, the inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind, except shell-fish, on the sea coasts and shores, and in the bays, harbors, and creeks of Canada, New Brunswick, Nova Scotia, Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the coasts and shores of those colonies and the islands thereof, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish; provided that, in so doing, they do not interfere with the rights of private property, or with British fishermen, in the peaceable use of any part of the said coast in their occupancy for the same purpose.

It is understood that the above-mentioned liberty applies solely to the sea fishery, and that the salmon and shad fisheries, and all fisheries in rivers and the mouths of rivers, are hereby reserved exclusively for British fishermen.

And it is further agreed that, in order to prevent or settle any disputes as to the places to which the reservation of exclusive right to British fishermen contained in this article, and that of fishermen of the United States contained in the next succeeding article, apply, each of the high contracting parties, on the application of either to the other, shall, within

six months thereafter, appoint a Commissioner. The said Commissioners, before proceeding to any business, shall make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment, and according to justice and equity, without fear, favor, or affection to their own country, upon all such places as are intended to be reserved and excluded from the common liberty of fishing under this and the next succeeding article; and such declaration shall be entered on the record of their proceedings.

The Commissioners shall name some third person to act as an Arbitrator or Umpire in any case or cases on which they may themselves differ in opinion. If they should not be able to agree upon the name of such third person, they shall each name a person, and it shall be determined by lot which of the two persons so named shall be the Arbitrator or Umpire in cases of difference or disagreement between the Commissioners. The person so to be chosen to be Arbitrator or Umpire shall, before proceeding to act as such in any case, make and subscribe a solemn declaration in a form similar to that which shall already have been made and subscribed by the Commissioners, which shall be entered on the record of their proceedings. In the event of the death, absence, or incapacity of either of the Commissioners, or of the Arbitrator or Umpire, or of their or his omitting, declining, or ceasing to act as such Commissioner, Arbitrator, or Umpire, another and different person shall be appointed or named as aforesaid to act as such Commissioner, Arbitrator, or Umpire, in the place and stead of the person so originally appointed or named as aforesaid, and shall make and subscribe such declaration as aforesaid.

Such Commissioners shall proceed to examine the coasts of the North American provinces and of the United States, embraced within the provisions of the first and second articles of this treaty, and shall designate the places reserved by the said articles from the common right of fishing therein.

The decision of the Commissioners and of the Arbitrator or Umpire shall be given in writing in each case, and shall be signed by them respectively.

The high contracting parties hereby solemnly engage to consider the decision of the Commissioners conjointly, or of the Arbitrator or Umpire, as the case may be, as absolutely final and conclusive in each case decided upon by them or him respectively.

ARTICLE II. It is agreed by the high contracting parties that British subjects shall have, in common with the citizens of the United States the liberty to take fish of every kind, except shell fish, on the eastern sea-coasts and shores of the United States north of the 36th parallel of north latitude, and on the shores of the several islands thereunto adjacent, and in the bays, harbors, and creeks of the said sea-coast and shores of the United States and of the said islands, without being restricted to any distance from the shore, with permission to land upon the said coasts of the United States and of the islands aforesaid, for the purpose of drying their nets and curing their fish: Provided, that, in so doing, they do not interfere with the rights of private property, or with the fishermen of the United States, in the peaceable use of any part of the said coasts in their occupancy for the same purpose.



It is understood that the above-mentioned liberty applies solely to the sea fishery, and that salmon and shad fisheries, and all fisheries in rivers and mouths of rivers, are hereby reserved exclusively for fishermen of the United States.

\* \* \* \* \*

ARTICLE VII. The present treaty shall be duly ratified, and the mutual exchange of ratifications shall take place in Washington within six months from the date hereof, or earlier if possible.

In faith whereof we, the respective Plenipotentiaries, have signed this treaty and have hereunto affixed our seals.

Done in triplicate, at Washington, the fifth day of June, anno Domini one thousand eight hundred and fifty-four.

[SEAL.]

W. L. MARCY.

[SEAL.]

ELGIN & KINCARDINE.

*Treaty for the final settlement of the claims of the Hudson's Bay and Puget's Sound Agricultural Companies.*

[Concluded July 1, 1863; ratifications exchanged at Washington March 3, 1864; proclaimed March 5, 1864.]

The United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, being desirous to provide for the final settlement of the claims of the Hudson's Bay and Puget's Sound Agricultural Companies, specified in Articles III. and IV. of the treaty concluded between the United States of America and Great Britain on the 15th of June, 1846, have resolved to conclude a treaty for this purpose, and have named as their Plenipotentiaries, that is to say:

The President of the United States of America, William H. Seward, Secretary of State; and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, the Right Honorable Richard Bickerton Pemell, Lord Lyons, a peer of her United Kingdom, a Knight Grand Cross of her most honorable Order of the Bath, and her Envoy Extraordinary and Minister Plenipotentiary to the United States of America;

Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon and concluded the following articles:

ARTICLE I. Whereas by the IIIrd and IVth articles of the treaty concluded at Washington on the 15th day of June, 1846, between the United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, it was stipulated and agreed that in the future appropriation of the territory south of the 49th parallel of north latitude, as provided in the first article of the said treaty, the possessory rights of the Hudson's Bay Company, and of all British subjects who may be already in the occupation of land or other property lawfully acquired within the said territory, should be respected, and that the farms, lands, and other property of every description, belonging to the Puget's Sound Agricultural Company, on the north side of the Columbia River, should be confirmed to the said company, but that in case the situation of those farms and lands should be considered by the United States to be of public and political importance, and the United States Government should signify a desire to obtain possession of the whole or of any part thereof, the prop-

erty so required should be transferred to the said Government at a proper valuation to be agreed upon between the parties;

And whereas it is desirable that all questions between the United States authorities on the one hand, and the Hudson's Bay and Puget's Sound Agricultural Companies on the other, with respect to the possessory rights and claims of those companies, and of any other British subjects in Oregon and Washington Territory, should be settled by the transfer of those rights and claims to the Government of the United States for an adequate money consideration:

It is hereby agreed that the United States of America and her Britannic Majesty shall, within twelve months after the exchange of the ratifications of the present treaty, appoint each a Commissioner for the purpose of examining and deciding upon all claims arising out of the provisions of the above quoted articles of the treaty of June 15, 1846.

ARTICLE II. The Commissioners mentioned in the preceding article shall, at the earliest convenient period after they shall have been respectively named, meet at the city of Washington, in the District of Columbia, and shall, before proceeding to any business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment, and according to justice and equity, without fear, favor, or affection to their own country, all the matters referred to them for their decision, and such declaration shall be entered on the record of their proceedings.

The Commissioners shall then proceed to name an Arbitrator or Umpire to decide upon any case or cases on which they may differ in opinion; and if they cannot agree in the selection, the said Arbitrator or Umpire shall be appointed by the King of Italy, whom the two high contracting parties shall invite to make such appointment, and whose selection shall be conclusive on both parties. The person so to be chosen shall, before proceeding to act, make and subscribe a solemn declaration, in a form similar to that which shall already have been made and subscribed by the Commissioners, which declaration shall also be entered on the record of the proceedings. In the event of the death, absence, or incapacity of such person, or of his omitting or declining or ceasing to act as such Arbitrator or Umpire, another person shall be named, in the manner aforesaid, to act in his place or stead, and shall make and subscribe such declaration as aforesaid.

The United States of America and Her Britannic Majesty engage to consider the decision of the two Commissioners conjointly, or of the Arbitrator or Umpire, as the case may be, as final and conclusive on the matters to be referred to their decision, and forthwith to give full effect to the same.

ARTICLE III. The Commissioners and the Arbitrator or Umpire shall keep accurate records and correct minutes or notes of all their proceedings, with the dates thereof, and shall appoint and employ such clerk or clerks or other persons as they shall find necessary to assist them in the transaction of the business which may come before them.

The salaries of the Commissioners and of the clerk or clerks shall be paid by their respective Governments. The salary of the Arbitrator or Umpire and the contingent expenses shall be defrayed in equal moieties by the two Governments.

ARTICLE IV. All sums of money which may be awarded by the Commissioners, or by the Arbitrator or Umpire, on account of any claim, shall be paid by the one Government to the other in two equal annual instalments, whereof the first shall be paid within twelve months after the date of the award, and the second within twenty-four months after the date of the award, without interest, and without any deduction whatever.

ARTICLE V. The present treaty shall be ratified, and the mutual exchange of ratifications shall take place in Washington, in twelve months from the date hereof, or earlier if possible.

In faith whereof we, the respective Plenipotentiaries, have signed this treaty, and have hereunto affixed our seals.

Done in duplicate at Washington, the first day of July, anno Domini one thousand eight hundred and sixty-three.

[SEAL.]

WILLIAM H. SEWARD.  
LYONS.

[SEAL.]

*Treaty relative to claims, fisheries, navigation of the St. Lawrence, &c.; American lumber on the River St. John; boundary.*

[Concluded May 8, 1871; ratifications exchanged at London June 17, 1871; proclaimed July 4, 1871.]<sup>1</sup>

ARTICLE XII. The high contracting parties agree that all claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of Her Britannic Majesty, arising out of acts committed against the persons or property of citizens of the United States during the period between the thirteenth of April, eighteen hundred and sixty-one, and the ninth of April, eighteen hundred and sixty-five, inclusive, not being claims growing out of the acts of the vessels referred to in Article I of this treaty, and all claims, with the like exception, on the part of corporations, companies, or private individuals, subjects of Her Britannic Majesty, upon the Government of the United States, arising out of acts committed against the persons or property of subjects of Her Britannic Majesty during the same period, which may have been presented to either Government for its interposition with the other, and which yet remain unsettled, as well as any other such claims which may be presented within the time specified in Article XIV. of this treaty, shall be referred to three Commissioners, to be appointed in the following manner, that is to say: One Commissioner shall be named by the President of the United States, one by Her Britannic Majesty, and a third by the President of the United States and Her Britannic Majesty conjointly; and in case the third Commissioner shall not have been so named within a period of three months from the date of the exchange of the ratifications of this treaty, then the third Commissioner shall be named by the Representative at Washington of His Majesty the King of Spain. In case of the death, absence, or incapacity of any Commissioner, or in the event of any Commissioner omitting or ceasing to act, the vacancy shall be filled in the manner hereinbefore provided for making the

<sup>1</sup> For the preamble of this treaty, and Articles I. to XI. inclusive, relating to the Alabama Claims, see vol. 1, pp. 547-553.

original appointment; the period of three months in case of such substitution being calculated from the date of the happening of the vacancy.

The Commissioners so named shall meet at Washington at the earliest convenient period after they have been respectively named; and shall, before proceeding to any business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment, and according to justice and equity, all such claims as shall be laid before them on the part of the Governments of the United States and of Her Britannic Majesty, respectively; and such declaration shall be entered on the record of their proceedings.

ARTICLE XIII. The Commissioners shall then forthwith proceed to the investigation of the claims which shall be presented to them. They shall investigate and decide such claims in such order and such manner as they may think proper, but upon such evidence or information only as shall be furnished by or on behalf of the respective Governments. They shall be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of the respective Governments in support of, or in answer to, any claim, and to hear, if required, one person on each side, on behalf of each Government, as counsel or agent for such Government, on each and every separate claim. A majority of the Commissioners shall be sufficient for an award in each case. The award shall be given upon each claim in writing, and shall be signed by the Commissioners assenting to it. It shall be competent for each Government to name one person to attend the Commissioners as its agent, to present and support claims on its behalf, and to answer claims made upon it, and to represent it generally in all matters connected with the investigation and decision thereof.

The high contracting parties hereby engage to consider the decision of the Commissioners as absolutely final and conclusive upon each claim decided upon by them, and to give full effect to such decisions without any objection, evasion, or delay whatsoever.

ARTICLE XIV. Every claim shall be presented to the Commissioners within six months from the day of their first meeting, unless in any case where reasons for delay shall be established to the satisfaction of the Commissioners, and then, and in any such case, the period for presenting the claim may be extended by them to any time not exceeding three months longer.

The Commissioners shall be bound to examine and decide upon every claim within two years from the day of their first meeting. It shall be competent for the Commissioners to decide in each case whether any claim has or has not been duly made, preferred, and laid before them, either wholly or to any and what extent, according to the true intent and meaning of this treaty.

ARTICLE XV. All sums of money which may be awarded by the Commissioners on account of any claim shall be paid by the one Government to the other, as the case may be, within twelve months after the date of the final award, without interest, and without any deduction save as specified in Article XVI. of this treaty.

ARTICLE XVI. The Commissioners shall keep an accurate record, and correct minutes or notes of all their proceedings, with the dates thereof, and may appoint and employ a secretary, and any other necessary officer, or officers, to assist them in the transaction of the business which may come before them.

Each Government shall pay its own Commissioner and Agent or Counsel. All other expenses shall be defrayed by the two Governments and in equal moieties.

The whole expenses of the commission, including contingent expenses, shall be defrayed by a ratable deduction on the amount of the sums awarded by the Commissioners, provided always that such deduction shall not exceed the rate of five per cent. on the sums so awarded.

ARTICLE XVII. The high contracting parties engage to consider the result of the proceedings of this commission as a full, perfect, and final settlement of all such claims as are mentioned in Article XII. of this treaty upon either Government; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, preferred, or laid before the said commission, shall, from and after the conclusion of the proceedings of the said commission, be considered and treated as finally settled, barred, and thenceforth inadmissible.

ARTICLE XVIII. It is agreed by the high contracting parties that, in addition to the liberty secured to the United States fishermen by the convention between the United States and Great Britain, signed at London on the 20th day of October 1818, of taking, curing, and drying fish on certain coasts of the British North American Colonies therein defined, the inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty, for the term of years mentioned in Article XXXIII. of this treaty, to take fish of every kind, except shell-fish, on the sea-coasts and shores, and in the bays, harbours, and creeks, of the provinces of Quebec, Nova Scotia, and New Brunswick, and the colony of Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the said coasts and shores and islands, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish; provided that, in so doing, they do not interfere with the rights of private property, or with British fishermen, in the peaceable use of any part of the said coasts in their occupancy for the same purpose.

It is understood that the above-mentioned liberty applies solely to the sea fishery, and that the salmon and shad fisheries, and all other fisheries in rivers and the mouths of rivers, are hereby reserved exclusively for British fishermen.

ARTICLE XIX. It is agreed by the high contracting parties that British subjects shall have, in common with the citizens of the United States, the liberty, for the term of years mentioned in Article XXXIII. of this treaty, to take fish of every kind, except shell-fish, on the eastern sea coasts and shores of the United States north of the thirty-ninth parallel of north latitude, and on the shores of the several islands thereunto adjacent, and in the bays, harbours, and creeks of the said sea-coasts and shores of the United States and of the said islands, without being restricted to any distance from the shore, with permission to land upon the said coasts of the United States and of the islands aforesaid, for the purpose of drying their nets and curing their fish; provided that, in so doing, they do not interfere with the rights of private property, or with the fishermen of the United States in the peaceable use of any part of the said coasts in their occupancy for the same purpose.

It is understood that the above-mentioned liberty applies solely to the sea fishery, and that salmon and shad fisheries, and all other fisheries in

rivers and mouths of rivers, are hereby reserved exclusively for fishermen of the United States.

ARTICLE XX. It is agreed that the places designated by the Commissioners appointed under the first article of the treaty between the United States and Great Britain, concluded at Washington on the 5th of June 1854, upon the coasts of Her Britannic Majesty's dominions and the United States, as places reserved from the common right of fishing under that treaty, shall be regarded as in like manner reserved from the common right of fishing under the preceding articles. In case any question should arise between the Governments of the United States and of Her Britannic Majesty as to the common right of fishing in places not thus designated as reserved, it is agreed that a commission shall be appointed to designate such places, and shall be constituted in the same manner, and have the same powers, duties, and authority as the commission appointed under the said first article of the treaty of the 5th of June 1854.

ARTICLE XXI. It is agreed that, for the term of years mentioned in Article XXXIII. of this treaty, fish oil and fish of all kinds, (except fish of the inland lakes, and of the rivers falling into them, and except fish preserved in oil,) being the produce of the fisheries of the United States, or of the Dominion of Canada, or of Prince Edward's Island, shall be admitted into each country, respectively, free of duty.

ARTICLE XXII. Inasmuch as it is asserted by the Government of Her Britannic Majesty that the privileges accorded to the citizens of the United States under Article XVIII. of this treaty are of greater value than those accorded by Articles XIX. and XXI. of this treaty to the subjects of Her Britannic Majesty, and this assertion is not admitted by the Government of the United States, it is further agreed that Commissioners shall be appointed to determine, having regard to the privileges accorded by the United States to the subjects of Her Britannic Majesty, as stated in Articles XIX. and XXI. of this treaty, the amount of any compensation which, in their opinion, ought to be paid by the Government of the United States to the Government of Her Britannic Majesty in return for the privileges accorded to the citizens of the United States under Article XVIII. of this treaty; and that any sum of money which the said Commissioners may so award shall be paid by the United States Government, in a gross sum, within twelve months after such award shall have been given.

ARTICLE XXIII. The Commissioners referred to in the preceding article shall be appointed in the following manner, that is to say: One Commissioner shall be named by the President of the United States, one by Her Britannic Majesty, and a third by the President of the United States and Her Britannic Majesty conjointly; and in case the third Commissioner shall not have been so named within a period of three months from the date when this article shall take effect, then the third Commissioner shall be named by the Representative at London of His Majesty the Emperor of Austria and King of Hungary. In case of the death, absence, or incapacity of any Commissioner, or in the event of any Commissioner omitting or ceasing to act, the vacancy shall be filled in the manner hereinbefore provided for making the original appointment, the period of three months in case of such substitution being calculated from the date of the happening of the vacancy.

The Commissioners so named shall meet in the city of Halifax, in the province of Nova Scotia, at the earliest convenient period after they have been respectively named, and shall, before proceeding to any business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide the matters referred to them to the best of their judgment, and according to justice and equity; and such declaration shall be entered on the record of their proceedings.

Each of the high contracting parties shall also name one person to attend the commission as its Agent, to represent it generally in all matters connected with the commission.

ARTICLE XXIV. The proceedings shall be conducted in such order as the Commissioners appointed under Articles XXII. and XXIII. of this treaty shall determine. They shall be bound to receive such oral or written testimony as either Government may present. If either party shall offer oral testimony, the other party shall have the right of cross-examination, under such rules as the Commissioners shall prescribe.

If in the case submitted to the Commissioners either party shall have specified or alluded to any report or document in its own exclusive possession, without annexing a copy, such party shall be bound, if the other party thinks proper to apply for it, to furnish that party with a copy thereof; and either party may call upon the other, through the Commissioners, to produce the originals or certified copies of any papers adduced as evidence, giving in each instance such reasonable notice as the Commissioners may require.

The case on either side shall be closed within a period of six months from the date of the organization of the Commission, and the Commissioners shall be requested to give their award as soon as possible thereafter. The aforesaid period of six months may be extended for three months in case of a vacancy occurring among the Commissioners under the circumstances contemplated in Article XXIII. of this treaty.

ARTICLE XXV. The Commissioners shall keep an accurate record and correct minutes or notes of all their proceedings, with the dates thereof, and may appoint and employ a Secretary and any other necessary officer or officers to assist them in the transaction of the business which may come before them.

Each of the high contracting parties shall pay its own Commissioner and Agent or Counsel; all other expenses shall be defrayed by the two Governments in equal moieties.

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ARTICLE XXXII. It is further agreed that the provisions and stipulations of Articles XVIII. to XXV. of this treaty, inclusive, shall extend to the colony of Newfoundland, so far as they are applicable. But if the Imperial Parliament, the Legislature of Newfoundland, or the Congress of the United States, shall not embrace the colony of Newfoundland in their laws enacted for carrying the foregoing articles into effect, then this article shall be of no effect; but the omission to make provision by law to give it effect, by either of the legislative bodies aforesaid, shall not in any way impair any other articles of this treaty.

ARTICLE XXXIII. The foregoing Articles XVIII. to XXV. inclusive, and Article XXX. of this treaty shall take effect as soon as the laws required

to carry them into operation shall have been passed by the Imperial Parliament of Great Britain, by the Parliament of Canada, and by the Legislature of Prince Edward's Island on the one hand, and by the Congress of the United States on the other. Such assent having been given, the said articles shall remain in force for the period of ten years from the date at which they may come into operation; and further until the expiration of two years after either of the high contracting parties shall have given notice to the other of its wish to terminate the same; each of the high contracting parties being at liberty to give such notice to the other at the end of the said period of ten years or at any time afterward.

ARTICLE XXXIV. Whereas it was stipulated by Article I. of the treaty concluded at Washington on the 15th of June 1846 between the United States and Her Britannic Majesty, that the line of boundary between the territories of the United States and those of Her Britannic Majesty, from the point of the forty-ninth parallel of north latitude up to which it had already been ascertained, should be continued westward along the said parallel of north latitude "to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly, through the middle of the said channel and of Fuca Straits, to the Pacific Ocean;" and whereas the Commissioners appointed by the two high contracting parties to determine that portion of the boundary which runs southerly through the middle of the channel aforesaid, were unable to agree upon the same; and whereas the Government of Her Britannic Majesty claims that such boundary line should, under the terms of the treaty above recited, be run through the Rosario Straits, and the Government of the United States claims that it should be run through the Canal de Haro, it is agreed that the respective claims of the Government of the United States and of the Government of Her Britannic Majesty shall be submitted to the arbitration and award of His Majesty the Emperor of Germany, who, having regard to the above-mentioned article of the said treaty, shall decide thereupon, finally and without appeal, which of those claims is most in accordance with the true interpretation of the treaty of June 15, 1846.

ARTICLE XXXV. The award of His Majesty the Emperor of Germany shall be considered as absolutely final and conclusive; and full effect shall be given to such award without any objection, evasion, or delay whatsoever. Such decision shall be given in writing and dated; it shall be in whatsoever form His Majesty may choose to adopt; it shall be delivered to the Representatives or other public Agents of the United States and of Great Britain, respectively, who may be actually at Berlin, and shall be considered as operative from the day of the date of the delivery thereof.

ARTICLE XXXVI. The written or printed case of each of the two parties, accompanied by the evidence offered in support of the same, shall be laid before His Majesty the Emperor of Germany within six months from the date of the exchange of the ratifications of this treaty, and a copy of such case and evidence shall be communicated by each party to the other, through their respective Representatives at Berlin.

The high contracting parties may include in the evidence to be considered by the Arbitrator such documents, official correspondence, and other official or public statements bearing on the subject of the reference as they may consider necessary to the support of their respective cases.



After the written or printed case shall have been communicated by each party to the other, each party shall have the power of drawing up and laying before the Arbitrator a second and definitive statement, if it think fit to do so, in reply to the case of the other party so communicated, which definitive statement shall be so laid before the Arbitrator, and also be mutually communicated in the same manner as aforesaid, by each party to the other, within six months from the date of laying the first statement of the case before the Arbitrator.

ARTICLE XXXVII. If, in the case submitted to the Arbitrator, either party shall specify or allude to any report or document in its own exclusive possession without annexing a copy, such party shall be bound, if the other party thinks proper to apply for it, to furnish that party with a copy thereof, and either party may call upon the other, through the Arbitrator, to produce the originals or certified copies of any papers adduced as evidence, giving in each instance such reasonable notice as the Arbitrator may require. And if the Arbitrator should desire further elucidation or evidence with regard to any point contained in the statements laid before him, he shall be at liberty to require it from either party, and he shall be at liberty to hear one Counsel or Agent for each party, in relation to any matter, and at such time, and in such manner, as he may think fit.

ARTICLE XXXVIII. The Representatives or other public Agents of the United States and of Great Britain at Berlin, respectively, shall be considered as the Agents of their respective Governments to conduct their cases before the Arbitrator, who shall be requested to address all his communications and give all his notices to such Representatives or other public Agents, who shall represent their respective Governments generally, in all matters connected with the arbitration.

ARTICLE XXXIX. It shall be competent to the Arbitrator to proceed in the said arbitration, and all matters relating thereto, as and when he shall see fit, either in person, or by a person or persons named by him for that purpose, either in the presence or absence of either or both Agents, and either orally, or by written discussion or otherwise.

ARTICLE XL. The Arbitrator may, if he think fit, appoint a Secretary, or Clerk, for the purposes of the proposed arbitration, at such rate of remuneration as he shall think proper. This, and all other expenses of and connected with the said arbitration, shall be provided for as hereinafter stipulated.

ARTICLE XLI. The Arbitrator shall be requested to deliver, together with his award, an account of all the costs and expenses which he may have been put to, in relation to this matter, which shall forthwith be repaid by the two Governments in equal moieties.

ARTICLE XLII. The Arbitrator shall be requested to give his award in writing as early as convenient after the whole case on each side shall have been laid before him, and to deliver one copy thereof to each of the said Agents.

ARTICLE XLIII. The present treaty shall be duly ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by Her Britannic Majesty; and the ratifications shall be exchanged either at Washington or at London within six months from the date hereof, or earlier if possible.

In faith whereof, we, the respective Plenipotentiaries, have signed this treaty and have hereunto affixed our seals.

Done in duplicate at Washington the eighth day of May, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.]

HAMILTON FISH.

[SEAL.]

ROBT. C. SCHENCK.

[SEAL.]

SAMUEL NELSON.

[SEAL.]

EBENEZER ROCKWOOD HOAR.

[SEAL.]

GEO. H. WILLIAMS.

[SEAL.]

DE GREY &amp; RIPON.

[SEAL.]

STAFFORD H. NORTHCOTE.

[SEAL.]

EDWD. THORNTON.

[SEAL.]

JOHN A. MACDONALD.

[SEAL.]

MOUNTAGUE BERNARD.

*Convention respecting places for holding sessions of the Commissioners under the twelfth article of the treaty of May 8, 1871.*

[Concluded January 18, 1873; ratifications exchanged at Washington April 10, 1873; proclaimed April 15, 1873.]

Whereas, pursuant to the XIIth Article of the treaty between the United States and Her Britannic Majesty of the 8th of May, 1871, it was stipulated that the Commissioners therein provided for should meet at Washington; but whereas it has been found inconvenient in the summer season to hold those meetings in the city of Washington, in order to avoid such inconvenience, the President of the United States has invested Hamilton Fish, Secretary of State, with full power, and Her Britannic Majesty has invested the Right Honourable Sir Edward Thornton, one of Her Majesty's Most Honourable Privy Council, Knight Commander of the Most Honourable Order of the Bath, Her Majesty's Envoy Extraordinary and Minister Plenipotentiary to the United States, with like power, who having met and examined their respective powers, which were found to be in proper form have agreed upon the following

#### ADDITIONAL ARTICLE.

It is agreed that the sessions of the Commissioners provided for by the twelfth Article of the Treaty between the United States and Her Britannic Majesty of the 8th of May 1871, need not be restricted to the city of Washington, but may be held at such other place within the United States as the commission may prefer.

The present Additional Article shall be ratified, and the ratifications shall be exchanged at Washington as soon as possible thereafter.

In witness whereof, we the respective Plenipotentiaries have signed the same and have hereunto affixed our respective seals.

Done in duplicate at the city of Washington, the eighteenth day of January, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.]

HAMILTON FISH.

[SEAL.]

EDWD. THORNTON.

*Convention for the arbitration of questions as to jurisdictional rights in Behring Sea.*

[Signed February 29, 1892; ratifications exchanged at Washington May 7, 1892; proclaimed May 9, 1892.]

The United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, being desirous to provide for an amicable settlement of the questions which have arisen between their respective governments concerning the jurisdictional rights of the United States in the waters of Behring's Sea, and concerning also the preservation of the fur-seal in, or habitually resorting to, the said Sea, and the rights of the citizens and subjects of either country as regards the taking of fur-seal in, or habitually resorting to, the said waters, have resolved to submit to arbitration the questions involved, and to the end of concluding a convention for that purpose have appointed as their respective Plenipotentiaries:

The President of the United States of America, James G. Blaine, Secretary of State of the United States; and

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Sir Julian Pauncefote, G. C. M. G., K. C. B., Her Majesty's Envoy Extraordinary and Minister Plenipotentiary to the United States;

Who, after having communicated to each other their respective full powers which were found to be in due and proper form, have agreed to and concluded the following articles.

ARTICLE I. The questions which have arisen between the Government of the United States and the Government of Her Britannic Majesty concerning the jurisdictional rights of the United States in the waters of Behring's Sea, and concerning also the preservation of the fur-seal in, or habitually resorting to, the said Sea, and the rights of the citizens and subjects of either country as regards the taking of fur-seal in, or habitually resorting to, the said waters, shall be submitted to a tribunal of Arbitration, to be composed of seven Arbitrators, who shall be appointed in the following manner, that is to say: Two shall be named by the President of the United States; two shall be named by Her Britannic Majesty; His Excellency the President of the French Republic shall be jointly requested by the High Contracting Parties to name one; His Majesty the King of Italy shall be so requested to name one; and His Majesty the King of Sweden and Norway shall be so requested to name one. The seven Arbitrators to be so named shall be jurists of distinguished reputation in their respective countries; and the selecting Powers shall be requested to choose, if possible, jurists who are acquainted with the English language.

In case of the death, absence or incapacity to serve of any or either of the said Arbitrators, or in the event of any or either of the said Arbitrators omitting or declining or ceasing to act as such, the President of the United States, or Her Britannic Majesty, or His Excellency the President of the French Republic, or His Majesty the King of Italy, or His Majesty the King of Sweden and Norway, as the case may be, shall name, or shall be requested to name forthwith another person to act as Arbitrator in the place and stead of the Arbitrator originally named by such head of a State.

And in the event of a refusal or omission for two months after receipt of the joint request from the High Contracting Parties of His Excellency the President of the French Republic, or His Majesty the King of Italy, or His Majesty the King of Sweden and Norway, to name an Arbitrator, either to fill the original appointment or to fill a vacancy as above provided, then in such case the appointment shall be made or the vacancy shall be filled in such manner as the High Contracting Parties shall agree.

ARTICLE II. The Arbitrators shall meet at Paris within twenty days after the delivery of the counter cases mentioned in Article IV, and shall proceed impartially and carefully to examine and decide the questions that have been or shall be laid before them as herein provided on the part of the Governments of the United States and Her Britannic Majesty respectively. All questions considered by the tribunal, including the final decision, shall be determined by a majority of all the Arbitrators.

Each of the High Contracting Parties shall also name one person to attend the tribunal as its Agent to represent it generally in all matters connected with the arbitration.

ARTICLE III. The printed case of each of the two parties, accompanied by the documents, the official correspondence, and other evidence on which each relies, shall be delivered in duplicate to each of the Arbitrators and to the Agent of the other party as soon as may be after the appointment of the members of the tribunal, but within a period not exceeding four months from the date of the exchange of the ratifications of this treaty.

ARTICLE IV. Within three months after the delivery on both sides of the printed case, either party may, in like manner deliver in duplicate to each of the said Arbitrators, and to the Agent of the other party, a counter case, and additional documents, correspondence, and evidence, in reply to the case, documents, correspondence, and evidence so presented by the other party.

If, however, in consequence of the distance of the place from which the evidence to be presented is to be procured, either party shall, within thirty days after the receipt by its agent of the case of the other party, give notice to the other party that it requires additional time for the delivery of such counter case, documents, correspondence and evidence, such additional time so indicated, but not exceeding sixty days beyond the three months in this Article provided, shall be allowed.

If in the case submitted to the Arbitrators either party shall have specified or alluded to any report or document in its own exclusive possession, without annexing a copy, such party shall be bound, if the other party thinks proper to apply for it, to furnish that party with a copy thereof; and either party may call upon the other, through the Arbitrators, to produce the originals or certified copies of any papers adduced as evidence, giving in each instance notice thereof within thirty days after delivery of the case; and the original or copy so requested shall be delivered as soon as may be and within a period not exceeding forty days after receipt of notice.

ARTICLE V. It shall be the duty of the Agent of each party, within one month after the expiration of the time limited for the delivery of the counter case on both sides, to deliver in duplicate to each of the said Arbitrators and to the Agent of the other party a printed argument showing the points and referring to the evidence upon which his Government

relies, and either party may also support the same before the Arbitrators by oral argument of counsel; and the Arbitrators may, if they desire further elucidation with regard to any point, require a written or printed statement or argument, or oral argument by counsel, upon it; but in such case the other party shall be entitled to reply either orally or in writing, as the case may be.

ARTICLE VI. In deciding the matters submitted to the Arbitrators, it is agreed that the following five points shall be submitted to them, in order that their award shall embrace a distinct decision upon each of said five points, to wit:

1. What exclusive jurisdiction in the sea now known as the Behring's Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

2. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?

3. Was the body of water now known as the Behring's Sea included in the phrase "Pacific Ocean," as used in the Treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring's Sea were held and exclusively exercised by Russia after said Treaty?

4. Did not all the rights of Russia as to jurisdiction, and as to the seal fisheries in Behring's Sea east of the water boundary, in the Treaty between the United States and Russia of the 30th. March, 1867, pass unimpaired to the United States under that Treaty?

5. Has the United States any right, and if so, what right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit?

ARTICLE VII. If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea, the Arbitrators shall then determine what concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such Regulations should extend, and to aid them in that determination the report of a Joint Commission to be appointed by the respective Governments shall be laid before them, with such other evidence as either Government may submit.

The High Contracting Parties furthermore agree to coöperate in securing the adhesion of other Powers to such Regulations.

ARTICLE VIII. The High Contracting Parties having found themselves unable to agree upon a reference which shall include the question of the liability of each for the injuries alleged to have been sustained by the other, or by its citizens, in connection with the claims presented and urged by it; and, being solicitous that this subordinate question should not interrupt or longer delay the submission and determination of the main questions, do agree that either may submit to the Arbitrators any question of fact involved in said claim and ask for a finding thereon, the question of the liability of either Government upon the facts found to be the subject of further negotiation.

ARTICLE IX. The High Contracting Parties having agreed to appoint two Commissioners on the part of each Government to make the joint investigation and report contemplated in the preceding Article VII, and to include the terms of the said Agreement in the present Convention, to the end that the joint and several reports and recommendations of said Commissioners may be in due form submitted to the Arbitrators should the contingency therefor arise, the said Agreement is accordingly herein included as follows:

Each Government shall appoint two Commissioners to investigate conjointly with the Commissioners of the other Government all the facts having relation to seal life in Behring's Sea, and the measures necessary for its proper protection and preservation.

The four Commissioners shall, so far as they may be able to agree, make a joint report to each of the two Governments, and they shall also report, either jointly or severally, to each Government on any points upon which they may be unable to agree.

These reports shall not be made public until they shall be submitted to the Arbitrators, or it shall appear that the contingency of their being used by the Arbitrators can not arise.

ARTICLE X. Each Government shall pay the expenses of its members of the Joint Commission in the investigation referred to in the preceding Article.

ARTICLE XI. The decision of the tribunal shall, if possible, be made within three months from the close of the argument on both sides.

It shall be made in writing and dated, and shall be signed by the Arbitrators who may assent to it.

The decision shall be in duplicate, one copy whereof shall be delivered to the Agent of the United States for his Government, and the other copy shall be delivered to the Agent of Great Britain for his Government.

ARTICLE XII. Each Government shall pay its own Agent and provide for the proper remuneration of the counsel employed by it and of the Arbitrators appointed by it, and for the expense of preparing and submitting its case to the tribunal. All other expenses connected with the Arbitration shall be defrayed by the two Governments in equal moieties.

ARTICLE XIII. The Arbitrators shall keep an accurate record of their proceedings and may appoint and employ the necessary officers to assist them.

ARTICLE XIV. The High Contracting Parties engage to consider the result of the proceedings of the tribunal of arbitration, as a full, perfect, and final settlement of all the questions referred to the Arbitrators.

ARTICLE XV. The present treaty shall be duly ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by Her Britannic Majesty; and the ratification shall be exchanged either at Washington or at London within six months from the date hereof, or earlier if possible.

In faith whereof, we, the respective Plenipotentiaries, have signed this treaty and have hereunto affixed our seals.

Done in duplicate at Washington the twenty-ninth day of February, one thousand eight hundred and ninety-two.

JAMES G. BLAINE. [SEAL.]

JULIAN PAUNCFOTE. [SEAL.]

*Convention for a Modus Vivendi pending the Behring Sea Arbitration.*

[Signed April 18, 1892; ratifications exchanged at Washington May 7, 1892; proclaimed May 9, 1892.]

Whereas by a Convention concluded between the United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, on the twenty-ninth day of February, one thousand eight hundred and ninety-two, the High Contracting Parties have agreed to submit to Arbitration, as therein stated, the questions which have arisen between them concerning the jurisdictional rights of the United States in the waters of Behring's Sea and concerning also the preservation of the fur-seal in, or habitually resorting to, the said sea, and the rights of the citizens and subjects of either country as regards the taking of the fur-seal in, or habitually resorting to, the said waters; and whereas the High Contracting Parties, having differed as to what restrictive Regulations for seal-hunting are necessary, during the pendency of such Arbitration, have agreed to adjust such difference in manner hereinafter mentioned, and without prejudice to the rights of either party:

The said High Contracting Parties have appointed as their Plenipotentiaries to conclude a Convention for this purpose, that is to say:

The President of the United States of America, James G. Blaine, Secretary of State of the United States;

And Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Sir Julian Pauncefote, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Knight Commander of the Most Honorable Order of the Bath, and Envoy Extraordinary and Minister Plenipotentiary of Her Britannic Majesty to the United States;

Who, after having communicated to each other their respective full powers, found in due and good form, have agreed upon and concluded the following Articles:

ARTICLE I. Her Majesty's Government will prohibit, during the pendency of the Arbitration, seal killing in that part of Behring Sea lying eastward of the line of demarcation described in Article No. I of the Treaty of 1867 between the United States and Russia, and will promptly use its best efforts to ensure the observance of this prohibition by British subjects and vessels.

ARTICLE II. The United States Government will prohibit seal-killing for the same period in the same part of Behring's Sea, and on the shores and islands thereof, the property of the United States (in excess of seven thousand five hundred to be taken on the islands for the subsistence of the natives), and will promptly use its best efforts to ensure the observance of this prohibition by United States citizens and vessels.

ARTICLE III. Every vessel or person offending against this prohibition in the said waters of Behring Sea outside of the ordinary territorial limits of the United States, may be seized and detained by the naval or other duly commissioned officers of either of the High Contracting Parties, but they shall be handed over as soon as practicable to the authorities of the Nation to which they respectively belong, who alone shall have jurisdiction to try the offence and impose the penalties for the same. The witnesses and proof necessary to establish the offence shall also be sent with them.

ARTICLE IV. In order to facilitate such proper inquiries as Her Majesty's Government may desire to make with a view to the presentation of the

case and arguments of that Government before the Arbitrators, it is agreed that suitable persons designated by Great Britain will be permitted at any time, upon application, to visit or remain upon the Seal Islands during the sealing season for that purpose.

ARTICLE V. If the result of the Arbitration be to affirm the right of British Sealers to take seals in Behring Sea within the bounds claimed by the United States, under its purchase from Russia, then compensation shall be made by the United States to Great Britain (for the use of her subjects) for abstaining from the exercise of that right during the pendency of the Arbitration upon the basis of such a regulated and limited catch or catches as in the opinion of the Arbitrators might have been taken without an undue diminution of the seal-herds; and, on the other hand, if the result of the Arbitration shall be to deny the right of British sealers to take seals within the said waters, then compensation shall be made by Great Britain to the United States (for itself, its citizens and lessees) for this agreement to limit the island catch to seven thousand five hundred a season, upon the basis of the difference between this number and such larger catch as in the opinion of the Arbitrators might have been taken without an undue diminution of the seal-herds.

The amount awarded, if any, in either case shall be such as under all the circumstances is just and equitable, and shall be promptly paid.

ARTICLE VI. This Convention may be denounced by either of the High Contracting Parties at any time after the thirty-first day of October, one thousand eight hundred and ninety-three, on giving to the other Party two months notice of its termination; and at the expiration of such notice the Convention shall cease to be in force.

ARTICLE VII. The present Convention shall be duly ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by Her Britannic Majesty; and the ratifications shall be exchanged either at Washington or at London as early as possible.

In faith whereof, we, the respective Plenipotentiaries have signed this Convention and have hereunto affixed our Seals.

Done in duplicate at Washington, this eighteenth day of April, one thousand eight hundred and ninety-two.

JAMES G. BLAINE. [SEAL.]

JULIAN PAUNCEFOTE. [SEAL.]

*Convention for the settlement of claims presented by Great Britain against the United States in virtue of the Convention of February 29, 1892.*

[Concluded February 8, 1896; ratification advised by the Senate, with amendments, April 15, 1896; ratified by the President April 23, 1896; ratified by Her Britannic Majesty May 14, 1896; ratifications exchanged June 3, 1896; proclaimed June 11, 1896.]

Whereas, a Convention between the Governments of the United States of America and Great Britain, providing for the settlement of claims presented by Great Britain against the United States in virtue of the Convention of February 29, 1892, between the same High Contracting Parties, was concluded and signed by their respective Plenipotentiaries at the City of Washington, on the eighth day of February 1896, which Convention, being in the English language, and as amended by the Senate of the United States, is word for word as follows:

Whereas by a Treaty between the United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland,



signed at Washington on February 29, 1892, the questions which had arisen between their respective Governments concerning the jurisdictional rights of the United States in the waters of Behring Sea, and concerning also the preservation of the fur-seal in, or habitually resorting to, the said Sea, and the rights of the citizens and subjects of either country as regards the taking of fur-seal in, or habitually resorting to, the said waters, were submitted to a Tribunal of Arbitration as therein constituted;

And whereas the High Contracting Parties having found themselves unable to agree upon a reference which should include the question of the liability of each for the injuries alleged to have been sustained by the other, or by its citizens, in connection with the claims presented and urged by it, did, by Article VIII. of the said Treaty, agree that either party might submit to the Arbitrators any questions of fact involved in said claims and ask for a finding thereon, the question of the liability of either Government on the facts found to be the subject of further negotiations;

And whereas the Agent of Great Britain did, in accordance with the provisions of said Article VIII., submit to the Tribunal of Arbitration certain findings of fact which were agreed to as proved by the Agent of the United States, and the Arbitrators did unanimously find the facts so set forth to be true, as appears by the Award of the Tribunal rendered on the 15th day of August 1893;

And whereas in view of the said findings of fact and of the decision of the Tribunal of Arbitration concerning the jurisdictional rights of the United States in Behring Sea and the right of protection or property of the United States in the fur-seals frequenting the islands of the United States in Behring Sea, the Government of the United States is desirous that in so far as its liability is not already fixed and determined by the findings of fact and the decision of said Tribunal of Arbitration, the question of such liability should be definitely and fully settled and determined, and compensation made, for any injuries for which, in the contemplation of the Treaty aforesaid, and the award and findings of the Tribunal of Arbitration compensation may be due to Great Britain from the United States;

And whereas it is claimed by Great Britain, though not admitted by the United States, that prior to the said award certain other claims against the United States accrued in favor of Great Britain on account of seizures of or interference with the following named British sealing vessels,—to wit, the *Wanderer*, the *Winifred*, the *Henrietta* and the *Oscar and Hattie*, and it is for the mutual interest and convenience of both the High Contracting Parties that the liability of the United States, if any, and the amount of compensation to be paid, if any, in respect of such claims and each of them should also be determined under the provisions of this Convention—all claims by Great Britain under Article V. of the *Modus Vivendi* of April 18, 1892 for the abstention from fishing of British sealers during the pendency of said arbitration having been definitely waived before the Tribunal of Arbitration:

The United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, to the end of concluding a Convention for that purpose, have appointed as their respective Plenipotentiaries:

The President of the United States, the Honorable Richard Olney, Secretary of State; and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, the Right Honorable Sir Julian Pauncefoot,

G. C. B., G. C. M. G., Her Majesty's Ambassador Extraordinary and Plenipotentiary to the United States;

Who, after having communicated to each other their respective full powers, which were found in due and proper form, have agreed to and concluded the following Articles:

ARTICLE I. The High Contracting Parties agree that all claims on account of injuries sustained by persons in whose behalf Great Britain is entitled to claim compensation from the United States and arising by virtue of the Treaty aforesaid, the award and the findings of the said Tribunal of Arbitration, as also the additional claims specified in the 5th paragraph of the preamble hereto, shall be referred to two Commissioners, one of whom shall be appointed by the President of the United States, and the other by Her Britannic Majesty, and each of whom shall be learned in the law. Appended to this Convention is a list of the claims intended to be referred.

ARTICLE II. The two Commissioners shall meet at Victoria, in the Province of British Columbia, Canada, as soon as practicable after the exchange of the ratifications of this Convention, and, after taking an oath that they will fairly and impartially investigate the claims referred to them and render a just decision thereon, they shall proceed jointly to the discharge of their duties.

The Commission shall also sit at San Francisco, California, as well as Victoria, provided either Commissioner shall so request if he shall be of opinion that the interests of justice shall so require, for reasons to be recorded on the minutes.

ARTICLE III. The said Commissioners shall determine the liability of the United States, if any, in respect of each claim and assess the amount of compensation, if any, to be paid on account thereof—so far as they shall be able to agree thereon—and their decision shall be accepted by the two Governments as final.

They shall be authorized to hear and examine, on oath or affirmation, which each of said Commissioners is hereby empowered to administer or receive, every question of fact not found by the Tribunal of Arbitration, and to receive all suitable authentic testimony concerning the same; and the Government of the United States shall have the right to raise the question of its liability before the Commissioners in any case where it shall be proved that the vessel was wholly or in part the actual property of a citizen of the United States.

The said Commission, when sitting at San Francisco or Victoria, shall have and exercise all such powers for the procurement or enforcement of testimony as may hereafter be provided by appropriate legislation.

ARTICLE IV. The Commissioners may appoint a Secretary and a clerk or clerks to assist them in the transaction of the business of the Commission.

ARTICLE V. In the cases, if any, in which the Commissioners shall fail to agree, they shall transmit to each Government a joint report stating in detail the points on which they differ, and the grounds on which their opinions have been formed; and any such difference shall be referred for final adjustment to an Umpire to be appointed by the two Governments jointly, or, in case of disagreement, to be nominated by the President of the Swiss Confederation at the request of the two Governments.

ARTICLE VI. In case of the death, or incapacity to serve, from sickness or any other cause, of either of the two Commissioners, or of the Umpire,

if any, his place shall be filled in the manner herein provided for the original appointment.

ARTICLE VII. Each Government shall provide for the remuneration of the Commissioner appointed by it.

The remuneration of the Umpire, if one should be appointed, and all contingent and incidental expenses of the Commission, or of the Umpire, shall be defrayed by the two Governments in equal moieties.

ARTICLE VIII. The amount awarded to Great Britain under this Convention on account of any claimant shall be paid by the Government of the United States to the Government of Her Britannic Majesty within six months after the amount thereof shall have been finally ascertained.

ARTICLE IX. The present Convention shall be duly ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by Her Britannic Majesty; and the ratifications shall be exchanged either at Washington or at London within six months from the date hereof, or earlier, if possible.

In faith whereof, we, the respective Plenipotentiaries, have signed this Convention and have hereunto affixed our seals.

Done in duplicate at Washington, the eighth day of February 1896.

RICHARD OLNEY. [SEAL.]

JULIAN PAUNCEFOTE. [SEAL.]

#### APPENDIX OF CLAIMS.

##### *Claims submitted to the Tribunal of Arbitration at Paris.*

Name of vessel.	Date of seizure.	Approximate distance from land when seized.	United States vessel making seizure.
Carolina .....	Aug. 1, 1886	75 miles .....	Corwin.
Thornton .....	Aug. 1, 1886	70 miles .....	Corwin.
Onward .....	Aug. 2, 1886	115 miles .....	Corwin.
Favorite .....	Aug. 2, 1886	Warned by Corwin in about same position as Onward.	
Anna Beck .....	July 2, 1887	66 miles .....	Rush.
W. P. Sayward .....	July 9, 1887	59 miles .....	Rush.
Dolphin .....	July 12, 1887	40 miles .....	Rush.
Grace .....	July 17, 1887	96 miles .....	Rush.
Alfred Adams .....	Aug. 10, 1887	62 miles .....	Rush.
Ada .....	Aug. 25, 1887	15 miles .....	Bea.
Triumph .....	Aug. 4, 1887	Warned by Rush not to enter Behring Sea.	
Juanita .....	July 31, 1889	65 miles .....	Rush.
Pathfinder .....	July 29, 1889	50 miles .....	Rush.
Triumph .....	July 11, 1889	Ordered out of Behring Sea by Rush—Query as to position when warned.	
Black Diamond .....	July 11, 1889	35 miles .....	Rush.
Lily .....	Aug. 6, 1889	66 miles .....	Rush.
Ariel .....	July 30, 1889	Ordered out of Behring Sea by Rush.	
Kate .....	Aug. 13, 1889	do .....	Rush.
Minnie .....	July 15, 1889	65 miles .....	Corwin.
Pathfinder .....	Mar. 27, 1890	Seized in Neah Bay .....	Corwin.

Personal Claims. .... 1886

Personal Claims. .... 1887

Costs in Sayward Case.

#### ADDITIONAL CLAIMS.

Wanderer .....

1887-89

Winifred .....

1891

Henrietta .....

1892

Oscar and Hattie .....

1892

## HAYTI.

*Protocol for the submission to an arbitrator of the claims of Antonio Pelletier and A. H. Lazare against Hayti.*

[Signed May 23, 1884.]

Whereas the Government of the United States of America has presented to the Government of Hayti the claims of Antonio Pelletier and A. H. Lazare for indemnity for acts against person and property alleged to have been done by Haytian authorities; and

Whereas the Government of Hayti has persistently denied its liability in the premises; and

Whereas the Honorable William Strong, formerly one of the Justices of the Supreme Court of the United States of America, inspires both the contracting parties with full confidence in his learning, ability and impartiality: therefore

The undersigned Frederick T. Frelinghuysen, Secretary of State of the United States, and Stephen Preston, Envoy Extraordinary and Minister Plenipotentiary of the Republic of Hayti, duly empowered thereto by their respective governments, have agreed upon the stipulations contained in the following articles.

ARTICLE I. The said claims of Antonio Pelletier and A. H. Lazare against the Republic of Hayti shall be referred to the said Honorable William Strong, as sole Arbitrator thereof, in conformity with the conditions hereinafter laid down.

ARTICLE II. The following facts as to these two claims are admitted by the Government of Hayti.

## AS TO ANTONIO PELLETIER:

That Pelletier was master of the bark *William*, which vessel entered Fort Liberté about the date claimed (31st March 1861); that the master and crew were arrested and tried on a charge of piracy and attempt at slave trading; that Pelletier, the master, was sentenced to be shot and the mate and other members of the crew to various terms of imprisonment; that the Supreme Court of Hayti reversed the judgment as to Pelletier, and sent the case to the Court at Cape Haytien, where he was retried, and sentenced to five years imprisonment; and that the vessel, with her tackle, was sold, and the proceeds divided between the Haytian Government and the party who, claiming to have suffered by her acts, proceeded against the vessel in a Haytian tribunal.

## AS TO A. H. LAZARE:

That Lazare entered into a written contract with the Haytian Government, September 23, 1874, for the establishment of a National Bank at Port-au-Prince, with branches, the capital being fixed at \$3,000,000, and afterwards reduced to \$1,500,000, of which capital the government was to furnish one-third part and Lazare two-thirds; that the bank was to be opened in one year from the date of the contract, and an extension of forty-five days on this time was granted on Lazare's request; and that on the day when the Bank was to be opened the Haytian Government, alleging that Lazare had not fulfilled his part of the engagement, declared, in

accordance with the stipulations of Article 24 of the agreement, the contract null and void, and forfeited on his, Lazare's, part.

ARTICLE III. The said Arbitrator shall receive and examine all papers and evidence relating to said claims, which may be presented to him on behalf of either government.

If, in the presence of such papers and evidence so laid before him, the said arbitrator shall request further evidence, whether documentary or by testimony given under oath before him or before any person duly commissioned to that end, the two governments, or either of them, engage to procure and furnish such further evidence by all means within their power, and all pertinent papers on file with either government shall be accessible to the said Arbitrator.

Both governments may be represented before said Arbitrator by Counsel, who may submit briefs, and may also be heard orally if so desired by the arbitrator.

ARTICLE IV. Before entering upon the discharge of his duties, the said Arbitrator shall subscribe to the following declaration:

"I do solemnly declare that I will decide impartially the claims of Antonio Pelletier and A. H. Lazare preferred on behalf of the Government of the United States against the Government of the Republic of Hayti; and that all questions laid before me by either government in reference to said claims shall be decided by me according to the rules of International Law existing at the time of the transactions complained of."

ARTICLE V. The said Arbitrator shall render his decision, separately, in each of the aforesaid cases, within one year from the date of this agreement.

ARTICLE VI. The High Contracting parties will pay equally the expenses of the Arbitration hereby provided; and they agree to accept the decision of said Arbitrator, in each of said cases, as final and binding, and to give to such decision full effect and force, in good faith, and without unnecessary delay or any reservation or evasion whatsoever.

In witness whereof, the undersigned have hereunto set their hands and seals this twenty-eighth day of May 1884.

FREDK. T. FRELINGHUYSEN. [L. S.]  
STEPHEN PRESTON. [L. S.]

*Additional protocol of agreement made for the purpose of extending to the 28 July 1885 the term provided by the protocol of agreement signed at Washington for the submission to an arbitration of the claims called Lazare and Pelletier.*

Whereas the Government of the United States has expressed to the Haytian Government the belief that the decision of the Arbitrator named in virtue of the Protocol of agreement, signed at Washington the 28 May 1884 for the consideration of the said claims cannot be rendered the 28 May next, conformably to the provisions of Article V. of the said Protocol;

Whereas a new delay is thus recognized as necessary to favour the decision by arbitration;

Whereas the Government of the United States having proposed the 28 July of the present year as the final term, the Haytian Government, on its

part accepts the date of the 28 July 1885 as the last delay for the consideration of the claims Lazare and Pelletier;

For these considerations and reasons;

The undersigned, John Mercer Langston, Minister Resident of the United States of America in Hayti, and Brenor Prophète, General of Division, Secretary of State of War and of the Marine, charged par interim of the portfolio of Foreign Relations, duly empowered by their respective Governments, have concluded the agreement contained in the following article:

SOLE ARTICLE.

The date of the 28 July 1885 is fixed as the last delay in which shall be delivered the decision of the Arbitrator charged to consider the claims known under the name of claims Lazare and Pelletier.

In witness whereof the undersigned have hereunto set their hands and seals this twentieth day of the month of March 1885.

JOHN MERCER LANGSTON. [SEAL.]

B. PROPHÈTE. [SEAL.]

*Protocol for the submission to an arbitrator of the claim of Charles Adrien Van Bokkelen.*

[Signed May 24, 1888.]

The United States of America and the Republic of Hayti, being mutually desirous of maintaining the good relations that have so long subsisted between them and of removing, for that purpose, all causes of difference their respective representatives, that is to say: Thomas F. Bayard, Secretary of State of the United States, and Stephen Preston, Envoy Extraordinary and Minister Plenipotentiary of the Republic of Hayti, have agreed upon and signed the following protocol:

1. It having been claimed on the part of the United States that the imprisonment of Charles Adrien Van Bokkelen, a citizen of the United States, in Hayti, was in derogation of the rights to which he was entitled as a citizen of the United States under the treaties between the United States and Hayti, which the Government of the latter country denies, it is agreed that the questions raised in the correspondence between the two Governments in regard to the imprisonment of the said Van Bokkelen shall be referred to the decision of a person to be agreed upon by the Secretary of State of the United States and the Envoy Extraordinary and Minister Plenipotentiary of the Republic of Hayti.

2. The referee so chosen shall decide the case upon such papers as may be presented to him by the Secretary of State of the United States and the Minister of Hayti respectively, within two months after the date of his appointment; but he shall not take into consideration any question not raised in the correspondence between the two Governments prior to the date of the signature of this protocol.

3. Each Government shall submit with the papers presented by it a brief of argument, and should the referee so desire, he may require further argument, oral or written, to be made within five months from the date of his appointment. He shall render his decision within six months from said date.

4. A reasonable fee to the Referee shall be paid by the Government of Hayti.

5. Any award made shall be final and conclusive and, if in favor of the claimant, shall be paid by the Government of Hayti within twelve (12) months of the date of such award.

Done in duplicate, at Washington this 24th day of May, one thousand eight hundred and eighty-eight.

T. F. BAYARD. [SEAL.]

STEPHEN PRESTON. [SEAL.]

### MEXICO.

#### *Convention for the adjustment of claims of citizens of the United States against Mexico.*

[Concluded April 11, 1839; ratifications exchanged at Washington April 7, 1840; proclaimed April 8, 1840.]

Whereas a convention for the adjustment of claims of citizens of the United States upon the Government of the Mexican Republic was concluded and signed at Washington on the 10th day of September 1838, which convention was not ratified on the part of the Mexican Government, on the alleged ground that the consent of His Majesty the King of Prussia to provide an arbitrator to act in the case provided by said convention could not be obtained;

And whereas the parties to said convention are still, and equally, desirous of terminating the discussions which have taken place between them in respect to said claims, arising from injuries to the persons and property of citizens of the United States by Mexican authorities, in a manner equally advantageous to the citizens of the United States, by whom said injuries have been sustained, and more convenient to Mexico than that provided by said convention:

The President of the United States has named for this purpose, and furnished with full powers, John Forsyth, Secretary of State of the said United States; and the President of the Mexican Republic has named His Excellency Señor Don Francisco Pizarro Martinez, accredited as Envoy Extraordinary and Minister Plenipotentiary of the Mexican Republic to the United States, and has furnished him with full powers for the same purpose;

And the said Plenipotentiaries have agreed upon and concluded the following articles:

ARTICLE I. It is agreed that all claims of citizens of the United States upon the Mexican Government, statements of which, soliciting the interposition of the Government of the United States, have been presented to the Department of State or to the diplomatic agent of the United States at Mexico until the signature of this convention, shall be referred to four commissioners, who shall form a board, and be appointed in the following manner, namely: two commissioners shall be appointed by the President of the United States, by and with the advice and consent of the Senate thereof, and two commissioners by the President of the Mexican Republic. The said commissioners, so appointed, shall be sworn impartially to examine and decide upon the said claims according to such evidence as shall be laid before them on the part of the United States and the Mexican Republic respectively.

ARTICLE II. The said board shall have two secretaries, versed in the English and Spanish languages; one to be appointed by the President of

the United States, by and with the advice and consent of the Senate thereof, and the other by the President of the Mexican Republic. And the said Secretaries shall be sworn faithfully to discharge their duty in that capacity.

ARTICLE III. The said board shall meet in the city of Washington within three months after the exchange of the ratifications of this convention, and within eighteen months from the time of its meeting shall terminate its duties. The Secretary of State of the United States shall, immediately after the exchange of the ratifications of this convention, give notice of the time of the meeting of the said board, to be published in two newspapers in Washington, and in such other papers as he may think proper.

ARTICLE IV. All documents which now are in, or hereafter, during the continuance of the commission constituted by this convention, may come into the possession of the Department of State of the United States, in relation to the aforesaid claims, shall be delivered to the board. The Mexican Government shall furnish all such documents and explanations as may be in their possession, for the adjustment of the said claims according to the principles of justice, the law of nations, and the stipulations of the treaty of amity and commerce between the United States and Mexico of the 5th of April 1831; the said documents to be specified when demanded at the instance of the said commissioners.

ARTICLE V. The said commissioners shall, by a report under their hands and seals, decide upon the justice of the said claims and the amount of compensation, if any, due from the Mexican Government in each case.

ARTICLE VI. It is agreed that if it should not be convenient for the Mexican Government to pay at once the amount so found due, it shall be at liberty, immediately after the decisions in the several cases shall have taken place, to issue Treasury notes, receivable at the maritime custom-houses of the Republic in payment of any duties which may be due or imposed at said custom-houses upon goods entered for importation or exportation; said Treasury notes to bear interest at the rate of eight per centum per annum from the date of the award on the claim in payment of which said Treasury notes shall have been issued until that of their receipt at the Mexican custom-houses. But as the presentation and receipt of said Treasury notes at said custom-houses in large amounts might be inconvenient to the Mexican Government, it is further agreed that, in such case, the obligation of said Government to receive them in payment of duties, as above stated, may be limited to one-half the amount of said duties.

ARTICLE VII. It is further agreed that in the event of the commissioners differing in relation to the aforesaid claims, they shall, jointly or severally, draw up a report, stating, in detail, the points on which they differ, and the grounds upon which their respective opinions have been formed. And it is agreed that the said report or reports, with authenticated copies of all documents upon which they may be founded, shall be referred to the decision of His Majesty the King of Prussia. But as the documents relating to the aforesaid claims are so voluminous that it cannot be expected His Prussian Majesty would be willing or able personally to investigate them, it is agreed that he shall appoint a person to act as an arbiter in his behalf; that the person so appointed shall proceed to Washington; that his



travelling expenses to that city and from thence on his return to his place of residence in Prussia, shall be defrayed, one-half by the United States and one half by the Mexican Republic; and that he shall receive as a compensation for his services a sum equal to one-half the compensation that may be allowed by the United States to one of the commissioners to be appointed by them, added to one-half the compensation that may be allowed by the Mexican Government to one of the commissioners to be appointed by it. And the compensation of such arbiter shall be paid, one-half by the United States and one-half by the Mexican Government.

ARTICLE VIII. Immediately after the signature of this convention, the Plenipotentiaries of the contracting parties (both being thereunto competently authorized) shall, by a joint note, addressed to the Minister for Foreign Affairs of His Majesty the King of Prussia, to be delivered by the Minister of the United States at Berlin, invite the said monarch to appoint an umpire to act in his behalf in the manner above mentioned, in case this convention shall be ratified respectively by the Governments of the United States and Mexico.

ARTICLE IX. It is agreed that, in the event of His Prussian Majesty's declining to appoint an umpire to act in his behalf, as aforesaid, the contracting parties, on being informed thereof, shall, without delay, invite Her Britannic Majesty, and in case of her declining, His Majesty the King of the Netherlands, to appoint an umpire to act in their behalf, respectively, as above provided.

*Convention for the settlement of claims.*

[Concluded July 4, 1868; ratifications exchanged at Washington February 1, 1869; proclaimed February 1, 1869.]

Whereas it is desirable to maintain and increase the friendly feelings between the United States and the Mexican Republic, and so to strengthen the system and principles of republican government on the American continent; and whereas since the signature of the treaty of Guadalupe Hidalgo, of the 2d of February 1848, claims and complaints have been made by citizens of the United States, on account of injuries to their persons and their property by authorities of that republic, and similar claims and complaints have been made on account of injuries to the persons and property of Mexican citizens by authorities of the United States, the President of the United States of America and the President of the Mexican Republic have resolved to conclude a convention for the adjustment of the said claims and complaints, and have named as their Plenipotentiaries, the President of the United States, William H. Seward, Secretary of State; and the President of the Mexican Republic, Matias Romero, accredited as Envoy Extraordinary and Minister Plenipotentiary of the Mexican Republic to the United States; who, after having communicated to each other their respective full powers, found in good and due form, have agreed to the following articles:

ARTICLE I. All claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of the Mexican Republic, arising from injuries to their persons or property by authorities of the Mexican Republic, and all claims on the part of corporations, companies, or private individuals, citizens of the Mexican Republic,

upon the Government of the United States, arising from injuries to their persons or property by authorities of the United States, which may have been presented to either Government for its interposition with the other since the signature of the treaty of Guadalupe Hidalgo between the United States and the Mexican Republic of the 2d of February 1848, and which yet remain unsettled, as well as any other such claims which may be presented within the time hereinafter specified, shall be referred to two commissioners, one to be appointed by the President of the United States, by and with the advice and consent of the Senate, and one by the President of the Mexican Republic. In case of the death, absence, or incapacity of either commissioner, or in the event of either commissioner omitting or ceasing to act as such, the President of the United States or the President of the Mexican Republic, respectively, shall forthwith name another person to act as commissioner in the place or stead of the commissioner originally named.

The commissioners so named shall meet at Washington within six months after the exchange of the ratifications of this convention, and shall, before proceeding to business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment, and according to public law, justice and equity, without fear, favor, or affection to their own country, upon all such claims above specified as shall be laid before them on the part of the Governments of the United States and of the Mexican Republic, respectively; and such declaration shall be entered on the record of their proceedings.

The commissioners shall then name some third person to act as an umpire in any case or cases on which they may themselves differ in opinion. If they should not be able to agree upon the name of such third person, they shall each name a person, and in each and every case in which the commissioners may differ in opinion as to the decision which they ought to give, it shall be determined by lot which of the two persons so named shall be umpire in that particular case. The person or persons so to be chosen to be umpire shall, before proceeding to act as such in any case, make and subscribe a solemn declaration in a form similar to that which shall already have been made and subscribed by the commissioners, which shall be entered on the record of their proceedings. In the event of the death, absence, or incapacity of such person or persons, or of his or their omitting, or declining, or ceasing to act as such umpire, another and different person shall be named, as aforesaid, to act as such umpire, in the place of the person so originally named, as aforesaid, and shall make and subscribe such declaration as aforesaid.

ARTICLE II. The commissioners shall then conjointly proceed to the investigation and decision of the claims which shall be presented to their notice, in such order and in such manner as they may conjointly think proper, but upon such evidence or information only as shall be furnished by or on behalf of their respective governments. They shall be bound to receive and peruse all written documents or statements which may be presented to them by or on behalf of their respective governments in support of, or in answer to any claim, and to hear, if required, one person on each side on behalf of each government on each and every separate claim. Should they fail to agree in opinion upon any individual claim, they shall call to their assistance the umpire whom they may have agreed to name,

or who may be determined by lot, as the case may be; and such umpire, after having examined the evidence adduced for and against the claim, and after having heard, if required, one person on each side as aforesaid, and consulted with the commissioners, shall decide thereupon finally and without appeal. The decision of the commissioners and of the umpire shall be given upon each claim in writing, shall designate whether any sum which may be allowed shall be payable in gold or in the currency of the United States, and shall be signed by them respectively. It shall be competent for each government to name one person to attend the commissioners as agent on its behalf, to present and support claims on its behalf, and to answer claims made upon it, and to represent it generally in all matters connected with the investigation and decision thereof.

The President of the United States of America and the President of the Mexican Republic hereby solemnly and sincerely engage to consider the decision of the commissioners conjointly, or of the umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him, respectively, and to give full effect to such decisions without any objection, evasion, or delay whatsoever.

It is agreed that no claim arising out of a transaction of a date prior to the 2d of February 1848 shall be admissible under this convention.

ARTICLE III. Every claim shall be presented to the commissioners within eight months from the day of their first meeting, unless in any case where reasons for delay shall be established to the satisfaction of the commissioners, or of the umpire in the event of the commissioners differing in opinion thereupon, and then and in any such case the period for presenting the claim may be extended to any time not exceeding three months longer.

The commissioners shall be bound to examine and decide upon every claim within two years and six months from the day of their first meeting. It shall be competent for the commissioners conjointly, or for the umpire if they differ, to decide in each case whether any claim has or has not been duly made, preferred, and laid before them, either wholly or to any and what extent, according to the true intent and meaning of this convention.

ARTICLE IV. When decisions shall have been made by the commissioners and the arbiter in every case which shall have been laid before them, the total amount awarded in all the cases decided in favor of the citizens of the one party shall be deducted from the total amount awarded to the citizens of the other party, and the balance, to the amount of three hundred thousand dollars, shall be paid at the city of Mexico or at the city of Washington, in gold or its equivalent, within twelve months from the close of the commission, to the government in favor of whose citizens the greater amount may have been awarded, without interest or any other deduction than that specified in Article VI. of this convention. The residue of the said balance shall be paid in annual installments to an amount not exceeding three hundred thousand dollars, in gold or its equivalent, in any one year until the whole shall have been paid.

ARTICLE V. The high contracting parties agree to consider the result of the proceedings of this commission as a full, perfect, and final settlement of every claim upon either government arising out of any transaction of a date prior to the exchange of the ratifications of the present convention;

and further engage that every such claim, whether or not the same may have been presented to the notice of, made, preferred, or laid before the said commission, shall, from and after the conclusion of the proceedings of the said commission, be considered and treated as finally settled, barred, and thenceforth inadmissible.

ARTICLE VI. The commissioners and the umpire shall keep an accurate record and correct minutes of their proceedings, with the dates. For that purpose they shall appoint two secretaries versed in the language of both countries to assist them in the transaction of the business of the commission. Each government shall pay to its commissioner an amount of salary not exceeding forty-five hundred dollars a year in the currency of the United States, which amount shall be the same for both governments. The amount of compensation to be paid to the umpire shall be determined by mutual consent at the close of the commission, but necessary and reasonable advances may be made by each government upon the joint recommendation of the commission. The salary of the secretaries shall not exceed the sum of twenty-five hundred dollars a year in the currency of the United States. The whole expenses of the commission, including contingent expenses, shall be defrayed by a ratable deduction on the amount of the sums awarded by the commission, provided always that such deduction shall not exceed five per cent. on the sums so awarded. The deficiency, if any, shall be defrayed in moieties by the two governments.

ARTICLE VII. The present convention shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by the President of the Mexican Republic, with the approbation of the Congress of that Republic; and the ratifications shall be exchanged at Washington within nine months from the date hereof, or sooner if possible.

In witness whereof the respective Plenipotentiaries have signed the same, and have affixed thereto the seals of their arms.

Done at Washington, the fourth day of July, in the year of our Lord one thousand eight hundred and sixty-eight.

[SEAL.]

WILLIAM H. SEWARD.

[SEAL.]

M. ROMERO.

*Convention for extension of the duration of the joint commission for the settlement of claims.*

[Concluded April 19, 1871; ratifications exchanged at Washington February 8, 1872; proclaimed February 8, 1872.]

Whereas a convention was concluded on the 4th day of July 1868 between the United States of America and the United States of Mexico, for the settlement of outstanding claims that have originated since the signing of the treaty of Guadalupe Hidalgo, on the 2d of February 1848, by a mixed commission limited to endure for two years and six months from the day of the first meeting of the commissioners; and whereas doubts have arisen as to the practicability of the business of the said commission being concluded within the period assigned:

The President of the United States of America and the President of the United States of Mexico are desirous that the time originally fixed for the duration of the said commission should be extended, and to this end have

named Plenipotentiaries to agree upon the best mode of effecting this object, that is to say: The President of the United States of America, Thomas H. Nelson, accredited as Envoy Extraordinary and Minister Plenipotentiary of the United States of America to the Mexican Republic; and the President of the United States of Mexico, Manuel Azpiroz, Chief Clerk and in charge of the Ministry of Foreign Relations of the United States of Mexico; who, after having presented their respective powers, and finding them sufficient and in due form, have agreed upon the following articles:

ARTICLE I. The high contracting parties agree that the term assigned in the convention of the 4th of July 1868, above referred to, for the duration of the said commission, shall be extended for a time not exceeding one year from the day when the functions of the said commission would terminate according to the convention referred to, or for a shorter time if it should be deemed sufficient by the commissioners, or the umpire in case of their disagreement.

It is agreed that nothing contained in this article shall in anywise alter or extend the time originally fixed in the said convention for the presentation of claims to the mixed commission.

ARTICLE II. The present convention shall be ratified, and the ratifications shall be exchanged at Washington, as soon as possible.

In witness whereof the above-mentioned Plenipotentiaries have signed the same and affixed their respective seals.

Done in the city of Mexico the 19th day of April, in the year one thousand eight hundred and seventy-one.

[SEAL.]

THOMAS H. NELSON.

[SEAL.]

MANUEL AZPIROZ.

*Convention for the revival and further extension of duration of the joint commission for the settlement of claims.*

[Concluded November 27, 1872; ratifications exchanged at Washington July 17, 1873; proclaimed July 24, 1873.]

Whereas, by the convention concluded between the United States and the Mexican Republic on the fourth day of July 1868, certain claims of citizens of the contracting parties were submitted to a joint commission, whose functions were to terminate within two years and six months, reckoning from the day of the first meeting of the commissioners; and

Whereas the functions of the aforesaid joint commission were extended, according to the convention concluded between the same parties on the nineteenth day of April 1871, for a term not exceeding one year from the day on which they were to terminate according to the first convention; and whereas the possibility of said commission's concluding its labors even within the period fixed by the aforesaid convention of April nineteenth 1871 is doubtful;

Therefore, the President of the United States of America and the President of the United States of Mexico, desiring that the term of the aforementioned commission should be again extended, in order to attain this end, have appointed, the President of the United States Hamilton Fish, Secretary of State, and the President of the United States of Mexico Ignacio Mariscal, accredited to the Government of the United States as

Envoy Extraordinary and Minister Plenipotentiary of said United States of Mexico, who, having exchanged their respective powers, which were found sufficient and in due form, have agreed upon the following articles:

ARTICLE I. The high contracting parties agree that the said commission be revived and that the time fixed by the convention of April nineteenth 1871 for the duration of the commission aforesaid, shall be extended for a term not exceeding two years from the day on which the functions of the said commission would terminate according to that convention, or for a shorter time if it should be deemed sufficient by the commissioners or the umpire, in case of their disagreement.

It is agreed that nothing contained in this article shall in any wise alter or extend the time originally fixed in the said convention for the presentation of claims to the commission.

ARTICLE II. The present convention shall be ratified and the ratifications shall be exchanged at Washington as soon as possible.

In witness whereof, the above-named Plenipotentiaries have signed the same and affixed their respective seals.

Done in the city of Washington the twenty-seventh day of November, in the year one thousand eight hundred and seventy-two.

[SEAL.]

HAMILTON FISH.

[SEAL.]

IGNO. MARISCAL.

*Convention for the further extension of duration of the joint commission for the settlement of claims.*

[Concluded November 20, 1874; ratifications exchanged at Washington January 28, 1875; proclaimed January 29, 1875.]

Whereas pursuant to the convention between the United States and the Mexican Republic of the 19th day of April 1871, the functions of the joint commission under the convention between the same parties of the 4th of July 1868 were extended for a term not exceeding one year from the day on which they were to terminate according to the convention last named:

And whereas pursuant to the first article of the convention between the same parties, of the twenty-seventh day of November one thousand eight hundred and seventy-two the joint commission above referred to was revived and again extended for a term not exceeding two years from the day on which the functions of the said commission would terminate pursuant to the said convention of the nineteenth day of April 1871; but whereas the said extensions have not proved sufficient for the disposal of the business before the said commission, the said parties being equally animated by a desire that all that business should be closed as originally contemplated, the President of the United States has for this purpose conferred full powers on Hamilton Fish, Secretary of State, and the President of the Mexican Republic has conferred like powers on Don Ignacio Mariscal, Envoy Extraordinary and Minister Plenipotentiary of that republic to the United States. And the said Plenipotentiaries, having exchanged their full powers, which were found to be in due form, have agreed upon the following articles.

ARTICLE I. The high contracting parties agree that the said commission shall again be extended, and that the time now fixed for its duration shall be prolonged for one year from the time when it would have expired pur-

suant to the convention of the twenty-seventh of November 1872: that is to say until the thirty-first day of January in the year one thousand eight hundred and seventy-six.

It is, however, agreed that nothing contained in this article shall in any wise alter or extend the time originally fixed by the convention of the 4th of July 1868 aforesaid, for the presentation of claims to the commission.

ARTICLE II. It is further agreed that, if at the expiration of the time when, pursuant to the first article of this convention, the functions of the commissioners will terminate, the umpire under the convention should not have decided all the cases which may then have been referred to him, he shall be allowed a further period of not more than six months for that purpose.

ARTICLE III. All cases which have been decided by the commissioners or by the umpire heretofore, or which shall be decided prior to the exchange of the ratifications of this convention, shall, from the date of such exchange be regarded as definitively disposed of, and shall be considered and treated as finally settled, barred, and thenceforth inadmissible. And, pursuant to the stipulation contained in the fourth article of the convention of the fourth day of July one thousand eight hundred and sixty-eight, the total amount awarded in cases already decided and which may be decided before the exchange of ratifications of this convention and in all cases which shall be decided within the times in this convention respectively named, for that purpose, either by the commissioners or by the umpire, in favor of citizens of the one party shall be deducted from the total amount awarded to the citizens of the other party, and the balance, to the amount of three hundred thousand dollars shall be paid at the city of Mexico, or at the city of Washington, in gold or its equivalent, within twelve months from the 31st day of January one thousand eight hundred and seventy-six to the government in favor of whose citizens the greater amount may have been awarded, without interest or any other deduction than that specified in Article VI. of that convention. The residue of the said balance shall be paid in annual installments to an amount not exceeding three hundred thousand dollars in gold or its equivalent, in any one year until the whole shall have been paid.

ARTICLE IV. The present convention shall be ratified and the ratifications shall be exchanged at Washington, as soon as possible.

In witness whereof the above named Plenipotentiaries have signed the same and affixed thereto their respective seals.

Done in Washington the twentieth day of November, in the year one thousand eight hundred and seventy-four.

[SEAL.]

HAMILTON FISH.

[SEAL.]

IGNO. MARISCAL.

*Convention extending functions of the umpire of the joint commission for the settlement of claims until November 20, 1876.*

[Concluded April 29, 1876; ratifications exchanged at Washington June 29, 1876; proclaimed June 29, 1876.]

Whereas pursuant to the Convention between the United States and the Mexican Republic of the 19th day of April 1871 the functions of the joint commission under the Convention between the same parties of the 4th

of July 1868 were extended for a term not exceeding one year from the day on which they were to terminate according to the convention last named;

And whereas pursuant to the first Article of the convention between the same parties, of the twenty-seventh day of November one thousand eight hundred and seventy-two, the joint Commission above referred to was revived and again extended for a term not exceeding two years from the day on which the functions of the said commission would terminate pursuant to the said Convention of the nineteenth day of April 1871;

And whereas pursuant to the Convention between the same parties, of the twentieth day of November one thousand eight hundred and seventy-four, the said commission was again extended for one year from the time when it would have expired pursuant to the Convention of the twenty-seventh of November, one thousand eight hundred and seventy-two, that is to say, until the thirty-first day of January one thousand eight hundred and seventy-six; and it was provided that if at the expiration of that time, the Umpire under the Convention should not have decided all the cases which may then have been referred to him, he should be allowed a further period of not more than six months for that purpose;

And whereas, it is found to be impracticable for the Umpire appointed pursuant to the Convention adverted to, to decide all the cases referred to him, within the said period of six months prescribed by the Convention of the twentieth of November one thousand eight hundred and seventy-four;

And the parties being still animated by a desire that all that business should be closed as originally contemplated, the President of the United States has for this purpose conferred full powers on Hamilton Fish, Secretary of State, and the President of the Mexican Republic has conferred like powers on Don Ignacio Mariscal, Envoy Extraordinary and Minister Plenipotentiary of that Republic to the United States; and the said Plenipotentiaries having exchanged their full powers, which were found to be in due form, have agreed upon the following articles:

ARTICLE I. The high contracting parties agree that if the Umpire appointed under the Convention above referred to, shall not, on or before the expiration of the six months allowed for the purpose by the second article of the Convention of the twentieth of November one thousand eight hundred and seventy-four, have decided all the cases referred to him, he shall then be allowed a further period until the twentieth day of November one thousand eight hundred and seventy-six, for that purpose.

ARTICLE II. It is further agreed that so soon after the twentieth day of November one thousand eight hundred and seventy-six, as may be practicable, the total amount awarded in all cases already decided, whether by the Commissioners or by the Umpire, and which may be decided before the said twentieth day of November, in favor of citizens of the one party shall be deducted from the total amount awarded to the citizens of the other party, and the balance, to the amount of three hundred thousand dollars, shall be paid at the city of Mexico, or at the city of Washington, in gold or its equivalent, on or before the thirty-first day of January one thousand eight hundred and seventy-seven, to the government in favor of whose citizens the greater amount may have been awarded, without interest or any other deduction than that specified in Article VI. of the said Convention of July 1868. The residue of the said balance shall be paid



in annual installments on the thirty-first day of January in each year, to an amount not exceeding three hundred thousand dollars, in gold or its equivalent, in any one year, until the whole shall have been paid.

ARTICLE III. The present Convention shall be ratified, and the ratifications shall be exchanged at Washington, as soon as possible.

In witness whereof the above-named Plenipotentiaries have signed the same and affixed thereto their respective seals.

Done in Washington, the twenty-ninth day of April, in the year one thousand eight hundred and seventy-six.

[SEAL.]

HAMILTON FISH.

[SEAL.]

IGNO. MARISCAL.

### PARAGUAY.

#### *Convention for the settlement of claims of the "United States and Paraguay Navigation Company."*

[Concluded February 4, 1859; ratifications exchanged at Washington, March 7, 1860; proclaimed March 12, 1860.]

His Excellency the President of the United States of America, and His Excellency the President of the Republic of Paraguay, desiring to remove every cause that might interfere with the good understanding and harmony, for a time so unhappily interrupted, between the two nations, and now so happily restored, and which it is so much for their interest to maintain; and desiring for this purpose to come to a definite understanding, equally just and honorable to both nations, as to the mode of settling a pending question of the said claims of the "United States and Paraguay Navigation Company"—a company composed of citizens of the United States—against the Government of Paraguay, have agreed to refer the same to a special and respectable commission, to be organized and regulated by the convention hereby established between the two high contracting parties; and for this purpose they have appointed and conferred full powers, respectively, to wit:

His Excellency the President of the United States of America upon James B. Bowlin, a Special Commissioner of the said United States of America, specifically charged and empowered for this purpose; and His Excellency the President of the Republic of Paraguay upon Señor Nicholas Vasquez, Secretary of State and Minister of Foreign Affairs of the said Republic of Paraguay;

Who, after exchanging their full powers, which were found in good and proper form, agreed upon the following articles:

ARTICLE I. The Government of the Republic of Paraguay binds itself for the responsibility in favor of the "United States and Paraguay Navigation Company," which may result from the decree of commissioners, who, it is agreed, shall be appointed as follows:

ARTICLE II. The two high contracting parties, appreciating the difficulty of agreeing upon the amount of the reclamations to which the said company may be entitled, and being convinced that a commission is the only equitable and honorable method by which the two countries can arrive at a perfect understanding thereof, hereby covenant to adjust them accordingly by a loyal commission. To determine the amount of said

reclamations, it is, therefore, agreed to constitute such a commission, whose decision shall be binding, in the following manner:

The Government of the United States of America shall appoint one Commissioner, and the Government of Paraguay shall appoint another; and these two, in case of disagreement, shall appoint a third, said appointment to devolve upon a person of loyalty and impartiality, with the condition that in case of difference between the Commissioners in the choice of an Umpire, the diplomatic representatives of Russia and Prussia, accredited to the Government of the United States of America, at the city of Washington, may select such Umpire.

The two Commissioners named in the said manner shall meet in the city of Washington, to investigate, adjust, and determine the amount of the claims of the above-mentioned company, upon sufficient proofs of the charges and defences of the contending parties.

ARTICLE III. The said Commissioners, before entering upon their duties, shall take an oath before some judge of the United States of America that they will fairly and impartially investigate the said claims, and a just decision thereupon render, to the best of their judgment and ability.

ARTICLE IV. The said Commissioners shall assemble, within one year after the ratification of the "treaty of friendship, commerce, and navigation" this day celebrated at the city of Assumption between the two high contracting parties, at the city of Washington, in the United States of America, and shall continue in session for a period not exceeding three months, within which, if they come to an agreement, their decision shall be proclaimed; and in case of disagreement, they shall proceed to the appointment of an Umpire as already agreed.

ARTICLE V. The Government of Paraguay hereby binds itself to pay to the Government of the United States of America, in the city of Assumption, Paraguay, thirty days after presentation to the Government of the Republic, the draft which that of the United States of America shall issue for the amount for which the two Commissioners concurring, or by the Umpire, shall declare it responsible to the said company.

ARTICLE VI. Each of the high contracting parties shall compensate the Commissioner it may appoint the sum of money he may stipulate for his services, either by installments or at the expiration of his task. In case of the appointment of an Umpire, the amount of his remuneration shall be equally borne by both contracting parties.

ARTICLE VII. The present convention shall be ratified within fifteen months, or earlier if possible, by the Government of the United States of America, and by the President of the Republic of Paraguay within twelve days from this date. The exchange of ratifications shall take place in the city of Washington.

In faith of which, and in virtue of our full powers, we have signed the present convention in English and Spanish, and have thereunto set our respective seals.

Done at Assumption, this fourth day of February, in the year of our Lord one thousand eight hundred and fifty-nine, being the eighty-third year of the Independence of the United States of America, and the forty-seventh of that of Paraguay.

[SEAL.]

[SEAL.]

JAMES B. BOWLIN.

NICOLAS VASQUEZ.

*Treaty of limits between the Argentine Republic and Paraguay.*

[Signed at Buenos Ayres, February 3, 1876; ratifications exchanged at Buenos Ayres, September 13, 1876.]

[Translation.]

The undersigned Ministers Plenipotentiary of Paraguay and of the Argentine Republic, named by their respective Governments in order to conclude the Boundary Treaty now pending between both Republics, having exchanged their full powers and having found them in good and due form, agreed as follows:

ART. I. The Republic of Paraguay is divided from the Argentine Republic on the east and on the south by the mid-channel of the main stream of the River Paraná from its confluence with the River Paraguay to the limits of the Empire of Brazil on its left bank; the island of Apipi belonging to the Argentine Republic, and the island of Yacireta to that of Paraguay, as declared by the Treaty of 1856.<sup>1</sup>

II. On the west the Republic of Paraguay is divided from the Argentine Republic by the mid-channel of the main stream of the River Paraguay from its confluence with the river Paraná; the territory of "El Chaco," as far as the main channel of the River Pilcomayo, which falls into the River Paraguay, in latitude 25° 20' south, according to Mouchez' map, and 25° 22' according to that of Brayer, being definitively recognized as belonging to the Argentine Republic.

III. The Island of Atajo or Cerrito belongs to the dominion of the Argentine Republic. The remaining permanent or temporary islands to be met with in either of the Rivers Paraná and Paraguay belong to the Argentine Republic or to that of Paraguay according to their position with reference to one or the other Republic, in conformity with the principles of international law which guide such matters. The channels existing between the said islands, including that of Cerrito, are common to the navigation of both States.

IV. The territory comprised between the main arm of the Pilcomayo and Bahia Negra shall be regarded as divided into two sections, the first being that comprised between Bahia Negra and the River Verde, which is situated in latitude 23° 10' south, according to Mouchez' map; and the second, that comprised between the said River Verde and the main arm of the Pilcomayo; the Villa Occidental being included in this section.

The Argentine Government definitively renounces all pretension or right over the first section.

The proprietorship or right over the territory of the second section, including Villa Occidental, is submitted to arbitration for final decision.

V. The two High Contracting Parties agree to name his Excellency the President of the United States of North America as Arbitrator, to decide on the right of sovereignty over the second section of territory, referred to in the foregoing Article.

VI. Within a period of 60 days from the ratification of the present Treaty, the High Contracting Parties shall address themselves jointly or separately to the Arbitrator aforementioned in order to solicit his acceptance (of that office.)

<sup>1</sup> Br. and For. State Papers, XLVI. 1305.

VII. If his Excellency the President of the United States should not accept the office of Judge of Arbitration, the Contracting Parties must agree to choose another arbitrator within 60 days from the receipt of his refusal; and if either Party should fail to attend within the period fixed upon for nomination, this shall be understood to have been definitively made by the Party which attended and gave notice thereof to the other. In this case, the decision which may be given by the Arbitrator shall be as fully binding as if he had been named by the mutual consent of both Parties, forasmuch as the abstention of one of them from the act of nomination will imply that it delegates this right to the other. A like period of 60 days, and the same conditions, shall hold good in the event of further refusal ("escusaciones").

VIII. The Arbitrator being named, the Government of Paraguay and that of the Argentine Republic shall, within the term of 12 months, reckoning from the time of his acceptance of the office, submit to him memorials embodying an exposition of the rights which each may consider itself to possess with reference to the territory in question, together with all documents, titles, maps, quotations, references, and whatsoever may be deemed by either favourable to its views; it being understood that, upon the expiry of the aforesaid period of 12 months, the discussion shall be brought to a final close by both Parties, whatsoever reason may be adduced to the contrary.

Upon the expiration of the term (above-named) it shall be in the power of the arbitrator alone to call for such additional documents or titles as may by him be deemed necessary in order to assist him in deciding or in grounding the verdict which he is called upon to pronounce.

IX. If within the term stipulated either of the Contracting Parties should fail to present the memorials, titles, and documents in support of his claims, the Arbitrator shall pronounce his decision having due regard to those which may have been produced by the other party and to the memoranda presented by the Paraguayan Minister and by the Argentine Minister in the year 1873, and the remaining diplomatic documents exchanged during the negotiations of the aforesaid year. If neither should have presented them, the Arbitrator shall give his decision; and in such case he shall regard the above-mentioned as sufficient explanation and proof.

Either Contracting Government can present the documents to the Arbitrator.

X. In the cases provided for in the foregoing Articles, the decision which may be given shall be final and binding on both Parties, without the power of giving any reason for objecting to its execution.

XI. It is agreed that, from the commencement of deciding, on the part of the Arbitrator, and until the termination, no alteration shall be made in the question submitted for arbitration; and that if any act of ownership be committed prior to decision being given, such act shall have no value whatever, nor be considered in the discussion to constitute a fresh title. It is equally agreed that the fresh concessions which shall be made by the Argentine Government in Villa Occidental, shall not be invoked as a title in its favour, but as simply implying the continuation of the jurisdiction exercised by it at the present time, and which shall continue until

the Arbitrator's decision be pronounced, in order not to jeopardize the position of that locality to the prejudice of the State to which it may definitively be awarded.

XII. It is agreed that, if the Arbitrator's decision should be in favour of the Argentine Republic, it shall respect the rights of property and possession of the Republic of Paraguay, and shall indemnify the latter for its public buildings; and should it be in favour of Paraguay, the latter shall equally respect the rights of possession and property of the Argentine Government, indemnifying likewise the Argentine Republic for the value of its public buildings. The amount of such indemnity, and the form of its payment, shall be determined by the commissioners named by the Contracting Parties, six months subsequent to a decision being pronounced by the Arbitrator. In the event of disagreement between these two Commissioners, they shall themselves name a third to settle the difference.

XIII. The surveys of territories made by the two countries shall not nullify those rights or titles which, directly or indirectly, may be held as regards the territory subject to arbitration.

XIV. The exchange of ratifications of the present Treaty shall take place in the city of Buenos Ayres within the shortest possible period.

In faith whereof the Plenipotentiaries have signed the present Treaty in duplicate, and affixed their seals in the city of Buenos Ayres, this 3d day of February 1876.

[L. S.]

BERNARDO DE IRIGOYEN.

[L. S.]

FACUNDO MACHAIN.

E. LAMARCA,

*Secretary to the Argentine Plenipotentiary.*

CARLOS SAGUIER,

*Secretary to the Plenipotentiary of Paraguay.*

#### PERU.

*Convention providing for the submission to arbitration of the claims of the owners of the "Lizzie Thompson" and "Georgiana," against Peru.*

[Concluded December 20, 1862; ratifications exchanged at Lima, April 21, 1863; proclaimed May 19, 1863.]

Whereas differences having arisen between the United States of America and the Republic of Peru, originating in the capture and confiscation by the latter of two ships belonging to citizens of the United States, called the *Lizzie Thompson* and *Georgiana*; and the two Governments not being able to come to an agreement upon the questions involved in said capture and confiscation, and being equally animated with the desire to maintain the relations of harmony which have always existed, and which it is desirable to preserve and strengthen between the two Governments, have agreed to refer all the questions, both of law and fact, involved in the capture and confiscation of said ships by the Government of Peru, to the decision of some friendly Power; and it being now expedient to proceed to and regulate the reference as above described, the United States of America and the Republic of Peru have for that purpose named their respective Plenipotentiaries, that is to say:

The President of the United States has appointed Christopher Robinson, their Envoy Extraordinary and Minister Plenipotentiary to Peru, and the

President of Peru Dr. José Gregorio Paz Soldan, Minister of State in the office of Foreign Relations and President of the Council of Ministers;

Who, after having exchanged their full powers, found to be in due and proper form, have agreed upon the following articles:

ARTICLE I. The two contracting parties agree in naming as arbiter, umpire, and friendly arbitrator, His Majesty the King of Belgium, conferring upon him the most ample power to decide and determine all the questions, both of law and fact, involved in the proceedings of the Government of Peru in the capture and confiscation of the ships *Lizzie Thompson* and *Georgiana*.

ARTICLE II. The two contracting parties will adopt the proper measures to solicit and obtain the assent of His Majesty the King of Belgium to act in the office hereby conferred upon him.

After His Majesty the King of Belgium shall have declared his assent to exercise the office of arbiter, the two contracting parties will submit, through their diplomatic agents residing at Brussels, to His Majesty copies of all the correspondence, proofs, papers, and documents which have passed between the two Governments or their respective representatives; and should either party think proper to present to said arbiter any other papers, proofs, or documents in addition to those above mentioned, the same shall be communicated to the other party within four months after the ratification of this convention.

ARTICLE III. Both parties being equally interested in having a decision upon the questions hereby submitted, they agree to deliver to the said arbiter all the documents referred to in the second article within six months after he shall have signified his consent to act as such.

ARTICLE IV. The sentence or decision of said arbiter, when given, shall be final and conclusive upon all the questions hereby referred, and the contracting parties hereby agree to carry the same into immediate effect.

ARTICLE V. This convention shall be ratified and the ratifications exchanged in the term of six months from the date hereof.

In faith whereof the Plenipotentiaries of the two Governments have signed and sealed, with their respective seals, the present convention.

Done in the city of Lima, in duplicate, on the twentieth day of December, in the year of our Lord one thousand eight hundred and sixty-two.

[SEAL.]

CHRISTOPHER ROBINSON.

[SEAL.]

JOSÉ G. PAZ SOLDAN.

*Convention for the settlement of claims.*

[Concluded January 12, 1863; ratifications exchanged at Lima April 18, 1863; proclaimed May 19, 1863.]

The United States of America and the Republic of Peru, desiring to settle and adjust amicably the claims which have been made by the citizens of each country against the Government of the other, have agreed to make arrangements for that purpose by means of a convention, and have named as their Plenipotentiaries to confer and agree thereupon as follows:

The President of the United States, Christopher Robinson, Envoy Extraordinary and Minister Plenipotentiary of said States to Peru, and the President of Peru, Dr. José Gregorio Paz Soldan, the Minister of Foreign Relations and President of the Council of Ministers;

Who, after having communicated to each other their respective full powers, found to be in due and proper form, have agreed as follows:

ARTICLE I. All claims of citizens of the United States against the Government of Peru, and of citizens of Peru against the Government of the United States, which have not been embraced in conventional or diplomatic agreement between the two Governments or their Plenipotentiaries, and statements of which, soliciting the interposition of either Government, may, previously to the exchange of the ratifications of this convention, have been filed in the Department of State at Washington, or the Department of Foreign Affairs at Lima, shall be referred to a mixed commission composed of four members, appointed as follows: Two by the Government of the United States, and two by the Government of Peru. In case of the death, absence, or incapacity of either Commissioner, or in the event of either Commissioner ceasing to act, the Government of the United States, or its Envoy Extraordinary and Minister Plenipotentiary in Peru, acting under its direction, or that of the Republic of Peru, shall forthwith proceed to fill the vacancy thus occasioned.

ARTICLE II. The Commissioners so named shall immediately after their organisation, and before proceeding to any other business, proceed to name a fifth person to act as an arbitrator or umpire in any case or cases in which they may themselves differ in opinion.

ARTICLE III. The Commissioners appointed as aforesaid shall meet in Lima within three months after the exchange of the ratifications of this convention; and each one of the Commissioners, before proceeding to any business, shall take an oath, made and subscribed before the most Excellent Supreme Court, that they will carefully examine and impartially decide, according to the principles of justice and equity, the principles of international law and treaty stipulations, upon all the claims laid before them under the provisions of this convention, and in accordance with the evidence submitted on the part of either Government. A similar oath shall be taken and subscribed by the person selected by the Commissioners as arbitrator or umpire, and said oaths shall be entered upon the record of the proceedings of said commission.

ARTICLE IV. The arbitrator or umpire being appointed, the Commissioners shall without delay, proceed to examine and determine the claims specified in the first article, and shall hear, if required, one person in behalf of each Government on each separate claim. Each government shall furnish, at the request of either of the Commissioners, the papers in its possession which may be important to the just determination of any of the claims referred.

ARTICLE V. From the decision of the Commissioners there shall be no appeal; and the agreement of three of them shall give full force and effect to their decisions, as well with respect to the justice of their claims as to the amount of indemnification that may be adjudged to the claimants; and in case the Commissioners cannot agree, the points of difference shall be referred to the arbitrator or umpire, before whom the Commissioners shall be heard, and his decision shall be final.

ARTICLE VI. The decision of the mixed commission shall be executed without appeal by each of the contracting parties, and it shall be the duty of the Commissioners to report to the respective Governments the

result of their proceedings; and if the decision of said Commissioners require the payment of indemnities to any of the claimants, the sums determined by the said Commissioners shall be paid by the Government against which they are awarded within one month after said Government shall have received the report of said Commissioners; and for any delay in the payment of the sum awarded after the expiration of said month, the sum of six per cent. interest shall be paid during such time as said delay shall continue.

ARTICLE VII. For the purpose of facilitating the labors of the mixed commission, each Government shall appoint a secretary to assist in the transaction of their business and to keep a record of their proceedings, and for the conduct of their business said commissioners are authorized to make all necessary rules.

ARTICLE VIII. The decisions of this Commission, or of the umpire in case of a difference between the Commissioners, shall be final and conclusive, and shall be carried into full effect by the two contracting parties. The Commission shall terminate its labors in six months from and including the day of its organization; provided, however, if at the time stipulated for the termination of said Commission any case or cases should be pending before the umpire and awaiting his decision, it is understood and agreed by the two contracting parties that said umpire is authorized to proceed and make his decision or award in such case or cases; and upon his report thereof to each of the two Governments, mentioning the amount of indemnity, if such shall have been allowed by him, such award shall be final and conclusive in the same manner as if it had been made by the Commissioners under their own agreement; provided that said decision shall be made by said umpire within thirty days after the final adjournment of said Commission, and at the expiration of the said thirty days the power and authority hereby granted to said umpire shall cease.

ARTICLE IX. Each Government shall pay its own Commissioners and secretary, but the umpire shall be paid, one-half by the Government of the United States and one-half by the Republic of Peru.

ARTICLE X. The present convention shall be ratified, and the ratifications thereof shall be exchanged in the term of four months from the date hereof.

In faith whereof, the respective Plenipotentiaries have signed the same and affixed their respective seals.

Done in the city of Lima this twelfth day of January, in the year of our Lord one thousand eight hundred and sixty-three.

[SEAL.]

CHRISTOPHER ROBINSON.

[SEAL.]

JOSÉ G. PAZ SOLDAN.

*Convention for the settlement of claims.*

[Concluded December 4, 1868; ratifications exchanged at Lima June 4, 1869; proclaimed July 6, 1869.]

Whereas claims may have, at various times since the signature of the decisions of the mixed commission which met in Lima in July, 1863, been made upon the Government of the United States of America, by citizens of Peru, and have been made by citizens of the United States of America



on the Government of Peru; and whereas some of such claims are still pending: The President of the United States of America and the President of Peru, being of opinion that a speedy and equitable settlement of all such claims will contribute much to the maintenance of the friendly feelings which subsist between the two countries, have resolved to make arrangements for that purpose by means of a convention, and have named as their Plenipotentiaries to confer and agree thereupon, that is to say:

The President of the United States names Alvin P. Hovey, Envoy Extraordinary and Minister Plenipotentiary of the United States of America near the Government of Peru; and the President of Peru names His Excellency Doctor Don José Antonio Barrenechea, Minister of Foreign Affairs of Peru;

Who, after having communicated to each other their respective full powers, found in good and true form, have agreed as follows:

ARTICLE I. The high contracting parties agree that all claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of Peru, and all claims on the part of corporations, companies, or private individuals, citizens of Peru, upon the Government of the United States, which may have been presented to either government for its interposition since the sittings of the said mixed commission, and which remain yet unsettled, as well as any other claims which may be presented within the time specified in Article III hereinafter, shall be referred to the two Commissioners, who shall be appointed in the following manner, that is to say: One Commissioner shall be named by the President of the United States, and one by the President of Peru. In case of the death, absence, or incapacity of either Commissioner, or in the event of either Commissioner omitting or ceasing to act as such, the President of the United States or the President of Peru, respectively, shall forthwith name another person to act as Commissioner in the place or stead of the Commissioner already named. The Commissioners so named shall meet at Lima at their earliest convenience after they have been respectively named, not to exceed three months from the ratification of this convention, and shall, before proceeding to any business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide to the best of their judgment, and according to justice and equity, without fear, favor, or affection to their own country, upon all such claims as shall be laid before them on the part of the Governments of the United States and Peru, respectively, and such declarations shall be entered on the record of the Commission.

The Commissioners shall then, and before proceeding to other business, name some third person of some third nation to act as an Arbitrator or Umpire in any case or cases on which they may themselves differ in opinion. If they should not be able to agree upon the name of such third person, they shall each name a person of a third nation, and in each and every case in which the Commissioners may differ in opinion as to the decision which they ought to give, it shall be determined by lot which of the two persons so named shall be the Arbitrator or Umpire in that particular case. The person or persons so to be chosen to be Arbitrator or Umpire shall, before proceeding to act as such in any case, make and subscribe a solemn declaration in a form similar to that which shall have already been made and

subscribed by the Commissioners, which shall be entered upon the records of their proceedings. In the event of the death, absence, or incapacity of such person or persons, or of his or their omitting or declining, or ceasing to act as such Arbitrator or Umpire, another and different person shall be named as aforesaid to act as such Arbitrator or Umpire in the place and stead of the person so originally named as aforesaid, and shall make and subscribe such declaration as aforesaid.

ARTICLE II. The Commissioners shall then forthwith proceed to the investigation of the claims which shall be presented to their notice. They shall investigate and decide upon such claims in such order and in such manner as they may conjointly think proper, but upon such evidence or information as shall be furnished by or on behalf of their respective Governments. They shall be bound to receive and peruse all written documents or statements which may be presented to them by or on behalf of their respective Governments, in support of or in answer to any claim, and to hear, if required, one person on each side on behalf of each Government as Counsel or Agent for such Government, on each and every separate claim. Should they fail to agree in opinion on any individual claim, they shall call to their assistance an Arbitrator or Umpire whom they have agreed to name, or who may be determined by lot, as the case may be, and such Arbitrator or Umpire, after having examined the evidence adduced for and against the claim, and after having heard, as required, one person on each side, as aforesaid, and consulted with the Commissioners, shall decide thereupon finally and without appeal. The decision of the Commissioners and of the Arbitrator or Umpire shall be given upon each claim in writing, and shall be signed by them respectively. It shall be competent for each Government to name one person to attend the Commissioners as agent on its behalf, and to answer claims made upon it, and to represent it generally in all matters connected with the investigation and decision thereof.

The President of the United States, and the President of Peru, hereby solemnly and sincerely engage to consider the decision of the Commissioners conjointly, or of the Arbitrator or Umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him, respectively, and to give full effect to such decisions, without any objections, evasion, or delay whatsoever. It is agreed that no claim arising out of any transaction of a date prior to the 30th of November 1863 shall be admissible under this convention.

ARTICLE III. Every claim shall be presented to the Commissioners within two months from the day of their first meeting, unless in any case where reasons for delay shall be established to the satisfaction of the Commissioners, or of the Arbitrator or Umpire, in the event of the Commissioners differing in opinion thereon, and then and in every such case the period for presenting the claim may be extended to any period not exceeding one month longer.

The Commissioners shall be bound to examine and decide upon every claim within six months from the day of their first meeting.

ARTICLE IV. All sums of money which may be awarded by the Commissioners, or by the Arbitrator or Umpire, on account of any claim, shall be paid by the one Government to the other, as the case may be, within four

months after the date of the decision, without interest, and without any deduction, save as specified in Article VI. hereinafter.

ARTICLE V. The high contracting parties agree to consider the result of the proceedings of this Commission as a full, perfect, and final settlement of every claim upon either Government arising out of any transaction of a date prior to the exchange of the ratifications of the present convention; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, preferred, or laid before the said Commissioners, shall, from and after the conclusion of the proceedings of the said Commission, be considered and treated as finally settled, barred, and therefore inadmissible.

ARTICLE VI. The salaries of the Commissioners shall not exceed forty-five hundred dollars in United States gold coin, each, yearly. Those of the secretaries and Arbitrator or Umpire shall be determined by the Commissioners; and in case the said Commission finish its labors in less than six months, the Commissioners, together with their assistants, will be entitled to six months' pay, and the whole expenses of the Commission shall be defrayed by a ratable deduction on the amount of the sums awarded by the Commissioners, provided always that such deduction shall not exceed the rate of five per cent. on the sums so awarded. The deficiency, if any, shall be defrayed by the two Governments in moieties.

ARTICLE VII. The present convention shall be ratified by the President of the United States, by and with the consent of the Senate thereof, and by the President of Peru, with the approbation of the Congress of that Republic, and the ratifications will be exchanged in Lima, as soon as may be, within six months of the date hereof.

ARTICLE VIII. The high contracting parties declare that this convention shall not be considered as a precedent obligatory on them, and that they remain in perfect liberty to proceed in the manner that may be deemed most convenient regarding the diplomatic claims that may arise in the future.

In witness whereof the respective Plenipotentiaries have signed the same in the English and Spanish languages, and have affixed thereto the seals of their arms.

Done in Lima the fourth day of December, in the year of our Lord one thousand eight hundred and sixty-eight.

[SEAL.]

ALVIN P. HOVEY.

[SEAL.]

J. A. BARRENECHEA.

#### PORTUGAL.

##### *Treaty providing for the payment of certain claims of American citizens.*

[Concluded February 26, 1851; ratifications exchanged at Lisbon June 23, 1851; proclaimed September 1, 1851.]

The United States of America and Her Most Faithful Majesty the Queen of Portugal and of the Algarves, equally animated with the desire to maintain the relations of harmony and amity which have always existed, and which it is desirable to preserve between the two powers, having agreed to terminate by a convention the pending questions between their respective Governments in relation to certain pecuniary claims of American citizens presented by the Government of the United States against the

Government of Portugal, have appointed as their Plenipotentiaries for that purpose, to wit:

The President of the United States of America, Daniel Webster, Secretary of State of said United States, and Her Most Faithful Majesty, J. C. de Figueiredo e Morão, of Her Council, Knight Commander of the Orders of Christ and of O. L. of Conception of Villa Viçosa, and Minister Resident of Portugal near the Government of the United States;

Who, after having exchanged their respective full powers, found to be in due and proper form, have agreed upon and concluded the following articles:

ARTICLE I. Her Most Faithful Majesty the Queen of Portugal and of the Algarves, appreciating the difficulty of the two Governments agreeing upon the subject of said claims, from the difference of opinion entertained by them respectively, which difficulty might hazard the continuance of the good understanding now prevailing between them, and resolved to maintain the same unimpaired, has assented to pay to the Government of the United States a sum equivalent to the indemnities claimed for several American citizens, (with the exception of that mentioned in the fourth article,) and which sum the Government of the United States undertakes to receive in full satisfaction of said claims, except as aforesaid, and to distribute the same among the claimants.

ARTICLE II. The high contracting parties, not being able to come to an agreement upon the question of public law involved in the case of the American privateer brig *General Armstrong*, destroyed by British vessels in the waters of the island of Fayal, in September 1814 Her Most Faithful Majesty has proposed, and the United States of America have consented, that the claim presented by the American Government, in behalf of the captain, officers, and crew of the said privateer, should be submitted to the arbitrament of a sovereign, potentate, or chief of some nation in amity with both the high contracting parties.

ARTICLE III. So soon as the consent of the sovereign, potentate, or chief of some friendly nation, who shall be chosen by the two high contracting parties, shall have been obtained to act as arbiter in the aforesaid case of the privateer brig *General Armstrong*, copies of all correspondence which has passed in reference to said claim between the two Governments and their respective representatives shall be laid before the arbiter, to whose decision the two high contracting parties hereby bind themselves to submit.

ARTICLE IV. The pecuniary indemnities which Her Most Faithful Majesty promises to pay, or cause to be paid, for all the claims presented previous to the 6th day of July 1850, in behalf of American citizens, by the Government of the United States, (with the exception of that of the *General Armstrong*) are fixed at ninety-one thousand seven hundred and twenty-seven dollars, in accordance with the correspondence between the two Governments.

ARTICLE V. The payment of the sum stipulated in the preceding article shall be made in Lisbon, in ten equal instalments, in the course of five years, to the properly-authorized agent of the United States. The first instalment of nine thousand one hundred and seventy-two dollars seventy cents, with interest as hereinafter provided, (or its equivalent in Portuguese current money,) shall be paid, as aforesaid, on the 30th day of

September of the current year of 1851, or earlier, at the option of the Portuguese Government; and at the end of every subsequent six months a like instalment shall be paid—the integral sum of ninety-one thousand seven hundred and twenty-seven dollars, or its equivalent, thus to be satisfied on or before the thirtieth day of September 1856.

ARTICLE VI. It is hereby agreed that each and all of the said instalments are to bear, and to be paid with an interest of six per cent. per annum, from the date of the exchange of the ratifications of the present convention.

ARTICLE VII. This convention shall be approved and ratified, and the ratifications shall be exchanged in the city of Lisbon within four months after the date thereof, or sooner if possible.

In testimony whereof the respective Plenipotentiaries have signed the same, and affixed thereto the seals of their arms.

Done in the city of Washington, D. C., the twenty-sixth day of February, of the year of our Lord one thousand eight hundred and fifty-one.

[SEAL.]

DAN'L WEBSTER.

[SEAL.]

J. C. DE FIGANIÈRE E MORÃO.

*Protocol for the settlement by arbitration of the title to the Island of Bulama.*

Protocol of a Conference held at the Foreign Office in Lisbon, on the 13th of January 1869, between Her Britannic Majesty's Envoy Extraordinary and Minister Plenipotentiary and the Minister for Foreign Affairs of His Most Faithful Majesty.

Whereas the Government of Her Britannic Majesty asserts a claim to the Island of Bulama, on the western coast of Africa, and to a certain portion of territory opposite to that island on the mainland; and whereas the Government of His Most Faithful Majesty asserts a claim to the same island, and the same territory opposite to it on the mainland; and whereas both Parties, being animated by a friendly feeling, and neither of them having any wish to appropriate territory which may lawfully belong to the other, have consented to refer their respective claims to the arbitration of a third Power, in whom both repose confidence.

For this purpose, they have agreed to apply to the President of the United States of America; and it now becomes necessary to place on record certain terms and arrangements with a view to obtaining the speedy and convenient hearing and determination of the claims in question; and the Undersigned, the Honourable Sir Charles A. Murray, Knight Commander of the Most Honourable Order of the Bath, Her Britannic Majesty's Envoy Extraordinary and Minister Plenipotentiary at the Court of Lisbon, and the Marquis de Sá da Bandeira, a Peer of the Realm, President of the Council of Ministers, Minister of War, and Minister *ad interim* for Foreign Affairs of His Most Faithful Majesty, being duly authorized by their respective Governments, have agreed as follows:

I. The respective claims of Her Britannic Majesty's Government and of the Government of His Most Faithful Majesty, to the Island of Bulama, on the Western Coast of Africa, and to a certain portion of territory opposite to that island on the mainland, shall be submitted to the arbitration and award of the President of the United States of America, who shall decide thereupon finally and without appeal.

II. The award of the President of the United States, whether it be wholly in favour of the claim of either Party, or in the nature of an equitable solution of the difficulty, shall be considered as absolutely final and conclusive; and full effect shall be given to such award, without any objection, evasion, or delay whatsoever. Such decision shall be given in writing, and dated; it shall be in whatever form the President may choose to adopt; it shall be delivered to the Ministers or other public Agents of Great Britain and of Portugal who may be actually at Washington, and shall be considered as operative from the day of the date of the delivery thereof.

III. The written or printed case of each of the two Parties, accompanied by the evidence offered in support of the same, shall be laid before the President within six months from the date hereof, and a copy of such case and evidence shall be communicated by each Party to the other through their respective Ministers at Washington.

After such communication shall have taken place, each Party shall have the power of drawing up, and laying before the President, a second and definitive statement, if it think fit so to do, in reply to the case of the other Party so communicated, which definitive statement shall be so laid before the Arbiter, and also be mutually communicated in the same manner as aforesaid by each Party to the other within six months from the date of laying the first statement of the case before the arbiter.

IV. If in the case submitted to the Arbiter, either Party shall specify or allude to any Report or Document in its own exclusive possession, without annexing a copy, such Party shall be bound, if the other Party thinks proper to apply for it, to furnish that Party with a copy thereof. And if the Arbiter should desire further elucidation or evidence with regard to any point contained in the statements laid before him, he shall be at liberty to require it from either Party; and he shall be at liberty to hear one counsel or agent for each Party in relation to any matters which he shall think fit, and at such time and in such manner as he may think fit.

V. The Ministers or other Public Agents of Great Britain, and of Portugal at Washington, respectively, shall be considered as the Agents of their respective Governments to conduct their case before the arbiter, who shall be requested to address all his communications and give all his notices to such Ministers or other Public Agents, whose acts shall bind their Governments to and before the Arbiter on this matter.

VI. It shall be competent to the Arbiter to proceed in the said arbitration, and all matters relating thereto, as and when he shall see fit, either in person, or by a person or persons named by him for that purpose; either with closed doors, or in public sitting; either in the presence or absence of either or both Agents; and either *visa voce*, or by written discussion or otherwise.

VII. The Arbiter shall, if he think fit, appoint a Secretary, Registrar, or Clerk, for the purposes of the proposed arbitration, at such rate or remuneration as he shall think proper. This, and all other expenses of and connected with the said arbitration shall be provided for as hereinafter stipulated.

VIII. The Arbiter shall be requested to deliver, together with his award, an account of all the costs and expenses which he may have been

put to in relation to this matter, which shall forthwith be repaid in two equal portions, one by each of the two Parties.

IX. The Arbiter shall be requested to give his award in writing as early as convenient after the whole case on each side shall have been laid before him, and to deliver one copy thereof to each of the said Agents.

Should the Arbiter be unable to decide wholly in favour of either of the respective claims, he shall be requested to give such a decision as will, in his opinion, furnish an equitable solution of the difficulty.

Should he decline to give any decision, then everything done in the premises by virtue of this agreement shall be null and void; and it shall be competent for the British and Portuguese Governments to do and proceed in all respects as if the reference to arbitration had never been made.

Done at Lisbon, this thirteenth day of January, eighteen hundred and sixty nine.

[L. S.]

C. A. MURRAY.

[L. S.]

SA DA BANDEIRA.

*Protocol for the Arbitration of the Delagoa Bay Railway Claim.*

[Signed June 13, 1891.<sup>1</sup>]

Le Président de la Confédération Suisse ayant fait connaître aux Gouvernements du Portugal, de la Grande Bretagne et des Etats-Unis de l'Amérique du Nord que le Conseil Fédéral Suisse avait pris en considération la demande que ces Gouvernements lui ont faite de bien vouloir nommer trois juriconsultes, choisis parmi les plus distingués, pour composer un tribunal arbitral chargé de fixer le montant de l'indemnité due par le Portugal aux ayant droit des deux autres pays à raison de la rescision de la concession du chemin de fer de Lourenço Marques et de la prise de possession de ce chemin de fer par le Gouvernement Portugais, les soussignés dument autorisés par leurs Gouvernements respectifs, sont convenus de ce que suit:

ART. I. Le mandat que les trois Gouvernements sont convenus de confier au Tribunal Arbitral est de fixer, comme il jugera le plus juste, le montant de la compensation due par le Gouvernement Portugais aux ayant droit des deux autres pays par suite de la rescision de la concession du chemin de fer de Lourenço Marques et de la prise de possession de ce chemin de fer par le Gouvernement Portugais et de trancher ainsi le différend existant entre les trois Gouvernements à cet égard.

ART. II. Le tribunal arbitral fixera aux Gouvernements de la Grande Bretagne et des Etats-Unis de l'Amérique du Nord le délai dans lequel ceux-ci devront lui remettre les mémoires, conclusions et documents.

Ces pièces seront transmises, en deux doubles, au Gouvernement Portugais avec invitation de produire également en deux doubles, sa réponse, ses conclusions et les documents à l'appui dans le délai qui lui sera fixé.

Le tribunal arbitral fixera lui-même, après avoir entendu les parties ou leur représentants et d'accord avec elles, le mode de procédure, notamment les délais ci-dessus mentionnés et ceux à fixer pour la remise de la réplique et de la duplique, les règles à suivre pour l'audition des parties ou de leurs représentants, la production de documents, la délibération dans cou sein (?), le prononcé du jugement et la rédaction du protocole.

<sup>1</sup>For translation, see *supra*, 1874.

Chacun des trois Gouvernements, s'engagent à faire tout ce que dépendra de lui pour que les pièces et renseignements demandés par le tribunal arbitral lui soient fournis en due forme et dans les délais fixés par lui.

ART. III. Le Tribunal Arbitral aura pleine compétence pour connaître des conclusions présentées par chacune des parties dans toute leur étendue et dans toute leurs dépendances ou incidents; il rendra son jugement sur le fond de la cause et prononcera comme il jugera le plus juste sur le montant de l'indemnité due par le Portugal aux ayant droit des deux autres pays par suite de la résiliation de la concession du chemin de fer de Lourenço Marques et de la prise de possession de ce chemin de fer par le même Gouvernement.

ART. IV. Le jugement sera définitif et sans appel. Le Président du Tribunal Arbitral délivrera aux représentants de chacun des trois Gouvernements, une expédition authentique de la sentence.

Les trois Gouvernements s'engagent d'avance pour leur propre part et pour la part de leurs ressortissants respectifs à accepter et exécuter la sentence, comme règlement final de tous leurs différends sur cette question.

Il est entendu que, bien qu'il appartienne au Tribunal de désigner les personnes privées ou les personnes morales ayant droit à l'indemnité, le montant de cette indemnité sera remis par le Gouvernement Portugais aux deux autres Gouvernements pour qu'ils en fassent la distribution aux ayant droit.

La quittance délivrée par ces Gouvernements constituera pour le Gouvernement Portugais une décharge complète et valable.

Le montant de l'indemnité sera remis par le Gouvernement Portugais aux deux autres gouvernements dans le délai de 6 mois à compter du prononcé du jugement.

ART. V. Le Président du Tribunal sera prié de présenter le compte de tous les frais occasionnés par l'arbitrage, et les trois Gouvernements s'engagent à les faire payer à l'époque que le Président designera.

En foi de quoi les soussignés ont dressé ce protocole et y ont approuvé leurs signatures et leurs sceaux.

Fait à Berne, en triple expédition, le 13 juin, 1891.

CHARLES S. SCOTT. [SEAL]

JOHN D. WASHBURN. [SEAL]

D. G. NOGUEIRA SOARES. [SEAL]

#### SPAIN.

##### *Treaty of friendship, limits, and navigation.*

[Concluded October 27, 1795; ratifications exchanged at Aranjuez April 25, 1796; proclaimed August 2, 1796.]

His Catholic Majesty and the United States of America, desiring to consolidate, on a permanent basis, the friendship and good correspondence which happily prevails between the two parties, have determined to establish, by a convention, several points, the settlement whereof will be productive of general advantage and reciprocal utility to both nations.

With this intention, His Catholic Majesty has appointed the most excellent Lord Don Manuel de Godoy, and Alvarez de Faria, Rios, Sanchez,



Zarzosa, Prince de la Paz, Duke de la Alcudia, Lord of the Soto de Roma, and of the State of Albalá, Grandee of Spain of the first class, perpetual Regidor of the city of Santiago, Knight of the illustrious Order of the Golden Fleece, and Great Cross of the Royal and distinguished Spanish Order of Charles the III, Commander of Valencia del Ventoso, Rivera, and Acenchal in that of Santiago; Knight and Great Cross of the religious Order of St. John; Counsellor of State; first Secretary of State and Despacho; Secretary to the Queen; Superintendent General of the Posts and Highways; Protector of the Royal Academy of the Noble Arts, and of the Royal Societies of Natural History, Botany, Chemistry, and Astronomy; Gentleman of the King's Chamber in employment; Captain General of his Armies; Inspector and Major of the Royal Corps of Body Guards, &c., &c., &c., and the President of the United States, with the advice and consent of their Senate, has appointed Thomas Pinckney, a citizen of the United States, and their Envoy Extraordinary to His Catholic Majesty. And the said Plenipotentiaries have agreed upon and concluded the following articles:

ARTICLE XXI. In order to terminate all differences on account of the losses sustained by the citizens of the United States in consequence of their vessels and cargoes having been taken by the subjects of His Catholic Majesty, during the late war between Spain and France, it is agreed that all such cases shall be referred to the final decision of Commissioners, to be appointed in the following manner. His Catholic Majesty shall name one Commissioner, and the President of the United States, by and with the advice and consent of their Senate, shall appoint another, and the said two Commissioners shall agree on the choice of a third, or if they cannot agree so, they shall each propose one person, and of the two names so proposed, one shall be drawn by lot in the presence of the two original Commissioners, and the person whose name shall be so drawn shall be the third Commissioner; and the three Commissioners so appointed shall be sworn impartially to examine and decide the claims in question, according to the merits of the several cases, and to justice, equity, and the laws of nations. The said Commissioners shall meet and sit at Philadelphia; and in the case of the death, sickness, or necessary absence of any such Commissioner, his place shall be supplied in the same manner as he was first appointed, and the new Commissioner shall take the same oaths, and do the same duties. They shall receive all complaints and applications authorized by this article, during eighteen months from the day on which they shall assemble. They shall have power to examine all such persons as come before them on oath or affirmation, touching the complaints in question, and also to receive in evidence all written testimony, authenticated in such manner as they shall think proper to require or admit. The award of the said Commissioners, or any two of them, shall be final and conclusive, both as to the justice of the claim and the amount of the sum to be paid to the claimants; and His Catholic Majesty undertakes to cause the same to be paid in specie, without deduction, at such times and places, and under such conditions as shall be awarded by the said Commissioners.

ARTICLE XXIII. The present treaty shall not be in force until ratified by the contracting parties, and the ratifications shall be exchanged in six months from this time, or sooner if possible.

In witness whereof we, the underwritten Plenipotentiaries of His Catholic Majesty and of the United States of America, have signed this present treaty of friendship, limits, and navigation, and have thereunto affixed our seals respectively.

Done at San Lorenzo el Real, this seven and twenty day of October one thousand seven hundred and ninety-five.

[SEAL.]

THOMAS PINCKNEY.

[SEAL.]

EL PRINCIPE DE LA PAZ.

*Convention for the indemnification of those who have sustained losses, damages, or injuries in consequences of the excesses of individuals of either nation during the late war, contrary to the existing treaty or the laws of nations.*

[Concluded August 11 1802; ratifications exchanged at Washington December 21, 1818; proclaimed December 22, 1818.]

His Catholic Majesty and the Government of the United States of America, wishing amicably to adjust the claims which have arisen from the excesses committed during the late war, by individuals of either nation, contrary to the laws of nations or the treaty existing between the two countries, His Catholic Majesty has given, for this purpose, full powers to His Excellency D<sup>n</sup> Pedro Cevallos, Councillor of State, Gentleman of the Bed-Chamber in employment, first Secretary of State and Universal Despatch, and Superintendent General of the Posts and Post-Offices in Spain and the Indies; and the Government of the United States of America to Charles Pinckney, a citizen of the said States, and their Minister Plenipotentiary near His Catholic Majesty; who have agreed as follows:

1st. A Board of Commissioners shall be formed, composed of five Commissioners, two of whom shall be appointed by His Catholic Majesty, two others by the Government of the United States, and the fifth by common consent; and in case they should not be able to agree on a person for the fifth Commissioner, each party shall name one, and leave the decision to lot; and hereafter, in case of the death, sickness, or necessary absence of any of those already appointed, they shall proceed in the same manner to the appointment of persons to replace them.

2d. The appointment of the Commissioners being thus made, each one of them shall take an oath to examine, discuss, and decide on the claims, which they are to judge, according to the laws of nations and the existing treaty, and with the impartiality justice may dictate.

3rd. The Commissioners shall meet and hold their sessions in Madrid, where, within the term of eighteen months (to be reckoned from the day on which they may assemble) they shall receive all claims which, in consequence of this convention, may be made, as well by the subjects of His Catholic Majesty as by citizens of the United States of America, who may have a right to demand compensation for the losses, damages, or injuries sustained by them, in consequence of the excesses committed by Spanish subjects or American citizens.

4th. The Commissioners are authorized, by the said contracting parties, to hear and examine, on oath, every question relative to the said demands, and to receive as worthy of credit all testimony the authenticity of which cannot reasonably be doubted.

5th. From the decisions of the Commissioners there shall be no appeal; and the agreement of three of them shall give full force and effect to their

decisions, as well with respect to the justice of the claims as to the amount of the indemnification which may be adjudged to the claimants; the said contracting parties obliging themselves to satisfy the said awards in specie, without deduction, at the times and places pointed out, and under the conditions which may be expressed by the Board of Commissioners.

6th. It not having been possible for the said Plenipotentiaries to agree upon a mode by which the above-mentioned Board of Commissioners should arbitrate the claims originating from the excesses of foreign cruisers, agents, Consuls, or tribunals in their respective territories, which might be imputable to their two Governments, they have expressly agreed that each Government shall reserve (as it does by this convention) to itself, its subjects or citizens respectively, all the rights which they now have, and under which they may hereafter bring forward their claims, at such times as may be most convenient to them.

7th. The present convention shall have no force or effect until it be ratified by the contracting parties, and the ratifications shall be exchanged as soon as possible.

In faith whereof we, the underwritten Plenipotentiaries, have signed this convention, and have affixed thereto our respective seals.

Done at Madrid this 11th day of August 1802.

[SEAL.]

PEDRO CEVALLOS.

[SEAL.]

CHARLES PINCKNEY.

*Treaty of amity, settlement, and limits.*

[Concluded February 22, 1819; ratifications exchanged at Washington February 22, 1821; proclaimed February 22, 1821.]

The United States of America and His Catholic Majesty, desiring to consolidate, on a permanent basis, the friendship and good correspondence which happily prevails between the two parties, have determined to settle and terminate all their differences and pretensions, by a treaty, which shall designate, with precision, the limits of their respective bordering territories in North America.

With this intention the President of the United States has furnished with their full powers John Quincy Adams, Secretary of State of the said United States; and His Catholic Majesty has appointed the Most Excellent Lord Don Luis De Onis, Gonzales, Lopez y Vara, Lord of the town of Rayaces, Perpetual Regidor of the Corporation of the city of Salamanca, Knight Grand Cross of the Royal American Order of Isabella the Catholic, decorated with the Lys of La Vendée, Knight Pensioner of the Royal and Distinguished Spanish Order of Charles the Third, Member of the Supreme Assembly of the said Royal Order; of the Council of His Catholic Majesty; His Secretary, with Exercise of Decrees, and His Envoy Extraordinary and Minister Plenipotentiary near the United States of America;

And the said Plenipotentiaries, after having exchanged their powers, have agreed upon and concluded the following articles:

ARTICLE IX. The two high contracting parties, animated with the most earnest desire of conciliation, and with the object of putting an end to all the differences which have existed between them, and of confirming the good understanding which they wish to be forever maintained between them, reciprocally renounce all claims for damages or injuries which they,

themselves, as well as their respective citizens and subjects, may have suffered until the time of signing this treaty.

The renunciation of the United States will extend to all the injuries mentioned in the convention of the 11th of August 1802.

2. To all claims on account of prizes made by French privateers, and condemned by French Consuls, within the territory and jurisdiction of Spain.

3. To all claims of indemnities on account of the suspension of the right of deposit at New Orleans in 1802.

4. To all claims of citizens of the United States upon the Government of Spain, arising from the unlawful seizures at sea, and in the ports and territories of Spain, or the Spanish colonies.

5. To all claims of citizens of the United States upon the Spanish Government, statements of which, soliciting the interposition of the Government of the United States, have been presented to the Department of State, or to the Minister of the United States in Spain, since the date of the convention of 1802, and until the signature of this treaty.

The renunciation of His Catholic Majesty extends—

1. To all the injuries mentioned in the convention of the 11th of August 1802.

2. To the sums which His Catholic Majesty advanced for the return of Captain Pike from the Provincias Internas.

3. To all injuries caused by the expedition of Miranda, that was fitted out and equipped at New York.

4. To all claims of Spanish subjects upon the Government of the United States arising from unlawful seizures at sea, or within the ports and territorial jurisdiction of the United States.

Finally, to all the claims of subjects of His Catholic Majesty upon the Government of the United States in which the interposition of His Catholic Majesty's Government has been solicited, before the date of this treaty and since the date of the convention of 1802, or which may have been made to the department of foreign affairs of His Majesty, or to his Minister in the United States.

And the high contracting parties, respectively, renounce all claim to indemnities for any of the recent events or transactions of their respective commanders and officers in the Floridas.

The United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers, and individual Spanish inhabitants by the late operations of the American Army in Florida.

ARTICLE X. The convention entered into between the two Governments, on the 11th of August 1802, the ratifications of which were exchanged the 21st December 1818, is annulled.

ARTICLE XI. The United States, exonerating Spain from all demands in future, on account of the claims of their citizens to which the renunciations herein contained extend, and considering them entirely cancelled, undertake to make satisfaction for the same, to an amount not exceeding five millions of dollars. To ascertain the full amount and validity of those claims, a commission, to consist of three Commissioners, citizens of the United States, shall be appointed by the President, by and with the

advice and consent of the Senate, which commission shall meet at the city of Washington, and, within the space of three years from the time of their first meeting, shall receive, examine, and decide upon the amount and validity of all the claims included within the descriptions above mentioned. The said Commissioners shall take an oath or affirmation, to be entered on the record of their proceedings, for the faithful and diligent discharge of their duties; and, in case of the death, sickness, or necessary absence of any such Commissioner, his place may be supplied by the appointment, as aforesaid, or by the President of the United States, during the recess of the Senate, of another Commissioner in his stead. The said Commissioners shall be authorized to hear and examine, on oath, every question relative to the said claims, and to receive all suitable authentic testimony concerning the same. And the Spanish Government shall furnish all such documents and elucidations as may be in their possession, for the adjustment of the said claims, according to the principles of justice, the laws of nations, and the stipulations of the treaty between the two parties of 27th October 1795; the said documents to be specified, when demanded, at the instance of the said Commissioners.

The payment of such claims as may be admitted and adjusted by the said Commissioners, or the major part of them, to an amount not exceeding five millions of dollars, shall be made by the United States, either immediately at their Treasury, or by the creation of stock, bearing an interest of six per cent. per annum, payable from the proceeds of sales of public lands within the territories hereby ceded to the United States, or in such other manner as the Congress of the United States may prescribe by law.

The records of the proceedings of the said Commissioners, together with the vouchers and documents produced before them, relative to the claims to be adjusted and decided upon by them, shall, after the close of their transactions, be deposited in the Department of State of the United States; and copies of them, or any part of them, shall be furnished to the Spanish Government, if required, at the demand of the Spanish Minister in the United States.

ARTICLE XII. The treaty of limits and navigation, of 1795, remains confirmed in all and each one of its articles excepting the 2, 3, 4, 21, and the second clause of the 22 article, which, having been altered by this treaty, or having received their entire execution, are no longer valid.

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ARTICLE XVI. The present treaty shall be ratified in due form, by the contracting parties, and the ratifications shall be exchanged in six months from this time, or sooner if possible.

In witness whereof we, the underwritten Plenipotentiaries of the United States of America and of His Catholic Majesty, have signed, by virtue of our powers, the present treaty of amity, settlement, and limits, and have thereunto affixed our seals, respectively.

Done at Washington this twenty-second day of February one thousand eight hundred and nineteen.

[SEAL.]

[SEAL.]

JOHN QUINCY ADAMS.

LUIS DE ONIS.

*Agreement for settlement of certain claims of citizens of the United States on account of wrongs and injuries committed by authorities of Spain in the Island of Cuba.*

[Concluded at Madrid February 11-12, 1871.]

LEGATION OF THE UNITED STATES,

*Madrid, February 11th, 1871.*

SIR: I have the honor to receive the note of to-day's date addressed to me by your excellency, proposing certain modifications of the plan of arrangement submitted to you on the 7th instant, for the adjustment of the reclamations made by my Government against that of Spain. I take much pleasure in stating that the changes suggested in the memorandum inclosed in your note have my entire concurrence, and have been duly embodied in the following record of the basis upon which we have agreed.

Memorandum of an arbitration for the settlement of the claims of citizens of the United States, or of their heirs, against the Government of Spain for wrongs and injuries committed against their persons and property, or against the persons and property of citizens of whom the said heirs are the legal representatives, by the authorities of Spain in the island of Cuba or within the maritime jurisdiction thereof, since the commencement of the present insurrection.

1. It is agreed that all such claims shall be submitted to arbitrators, one to be appointed by the Secretary of State of the United States, another by the Envoy Extraordinary and Minister Plenipotentiary of Spain at Washington, and these two to name an umpire who shall decide all questions upon which they shall be unable to agree; and in case the place of either arbitrator or of the umpire shall from any cause become vacant, such vacancy shall be filled forthwith in the manner herein provided for the original appointment.

2. The arbitrators and umpire so named shall meet at Washington within one month from the date of their appointment and shall, before proceeding to business, make and subscribe a solemn declaration that they will impartially hear and determine, to the best of their judgment and according to public law, and the treaties in force between the two countries, and these present stipulations, all such claims as shall, in conformity with this agreement, be laid before them on the part of the Government of the United States; and such declaration shall be entered upon the record of their proceedings.

3. Each Government may name an advocate to appear before the arbitrators or the umpire, to represent the interests of the parties respectively.

4. The arbitrators shall have full power, subject to these stipulations, and it shall be their duty before proceeding with the hearing and decision of any case, to make and publish convenient rules prescribing the time and manner of the presentation of claims and of the proof thereof; and any disagreement with reference to the said rules of proceeding shall be decided by the umpire. It is understood that a reasonable period shall be allowed for the presentation of the proofs; that all claims and the testimony in favor of them shall be presented only through the Government of the United States; that the award made in each case shall be in writing and, if indemnity be given, the sum to be paid shall be expressed in the gold coin of the United States.

5. The arbitrators shall have jurisdiction of all claims presented to them by the Government of the United States for injuries done to citizens of the United States by the authorities of Spain in Cuba since the first day of October 1868. Adjudications of the tribunals in Cuba, concerning citizens of the United States, made in the absence of the parties interested, or in violation of international law, or of the guarantees and forms provided for in the treaty of October 27, 1795, between the United States and Spain, may be reviewed by the arbitrators, who shall make such award in any such case as they shall deem just. No judgment of a Spanish tribunal, disallowing the affirmation of a party that he is a citizen of the United States shall prevent the arbitrators from hearing a reclamation presented in behalf of said party by the United States Government. Nevertheless, in any case heard by the arbitrators, the Spanish Government may traverse the allegation of American citizenship and thereupon competent and sufficient proof thereof will be required. The commission having recognized the quality of American citizens in the claimants, they will acquire the rights accorded to them by the present stipulations as such citizens. And it is further agreed that the arbitrators shall not have jurisdiction of any reclamation made in behalf of a native-born Spanish subject naturalized in the United States if it shall appear, that the same subject-matter having been adjudicated by a competent tribunal in Cuba and the claimant, having appeared therein, either in person or by his duly appointed attorney and being required by the laws of Spain to make a declaration of his nationality, failed to declare that he was a citizen of the United States; in such case and for the purposes of this arbitration, it shall be deemed and taken that the claimant, by his own default, had renounced his allegiance to the United States. And it is further agreed that the arbitrators shall not have jurisdiction of any demands growing out of contracts.

6. The expenses of the arbitration will be defrayed by a percentage to be added to the amount awarded. The compensation of the arbitrators and umpire shall not exceed three thousand dollars each; the same allowance shall be made to each of the two advocates representing respectively the two Governments; and the arbitrators may employ a secretary at a compensation not exceeding the sum of five dollars a day for every day actually and necessarily given to the business of the arbitration.

7. The two Governments will accept the awards made in the several cases submitted to the said arbitration as final and conclusive, and will give full effect to the same in good faith and as soon as possible.

I avail myself of this opportunity to renew to your excellency the assurances of my most distinguished consideration.

D. E. SICKLES.

His Excellency the MINISTER OF STATE.

[Translation.]

MINISTRY OF STATE,

*Madrid, February 12, 1871.*

SIR: I have had the honor to receive the note you were pleased to address me under date of yesterday, communicating to me the definite record of the memorandum in reference to the manner of arranging the settlement of the reclamations of citizens of the United States consequent

upon the insurrection in the island of Cuba, and as, in drawing up this document, you have kindly incorporated the slight modifications I proposed to you, for greater clearness and precision, in my note of yesterday in answer to yours of the 7th, I take pleasure in informing you that I entirely concur in the contents of the said memorandum.

I improve this occasion to renew to you the assurances of my most distinguished consideration.

CRISTINO MARTOS.

The MINISTER Plenipotentiary of the  
UNITED STATES OF AMERICA.

*Agreement for terminating the Claims Commission formed under the agreement of February 12, 1871.*

[Concluded February 23, 1881.]

DEPARTMENT OF STATE,  
*Washington, February 23, 1881.*

SIR: I have had the honor to hold several recent conferences with you, touching the desire of your Government, formally expressed in the note of the Minister of State, Señor Elduayen, to the Minister of the U. S. at Madrid on the 5th of July 1880; for the adoption of an accord between the two Governments looking to the fixation of a term for the labors of the American and Spanish Claims Commission which was organized under the agreement of February 12, 1871. In those conferences, the entire agreement of our views in the matter happily renders any discussion thereof unnecessary, save only as to the form and manner of placing such agreement of views on record, with the same force and effect as the original agreement of 1871.

As you are aware, the agreement of 1871 was discussed between the U. S. Minister at Madrid and the Spanish Minister of State for some time before a final understanding was reached, during which time various written projects and counter projects of an agreement were reciprocally submitted and considered, and that at the wish of the Spanish government itself, it was determined that a final accord should be effected by simple exchange of diplomatic notes. This was accordingly done and the date of Señor Martos' note accepting the completed redaction of the agreement became, therefore, the date of the agreement itself. It is thought unnecessary that a fresh agreement determining the duration of the Commission should involve more of formality than the original accord whereby the commission itself was created; and I have, accordingly, the honor to propose, for your prompt acceptance as I doubt not a like conclusion of our present negotiation by means of a simple exchange of diplomatic notes, and in the suggested form of an additional article to the Agreement of 1871.

I believe that you and I are in accord upon the substantial points of the following text of such additional article, as the result of our deliberations thereon.

"VIII. All claims for injuries done to citizens of the United States by the Authorities of Spain in Cuba, since the first day of October, A. D. 1868, which have not heretofore been presented by the Government of the U. S. to the Commission now sitting in Washington under the agreement of February 12, 1871, shall be so presented to the said Commission within



sixty days, from this twenty-third day of February 1881, unless in any case where reasons for delay shall be established to the satisfaction of the Arbitrators, and in any such case the period for presenting the claim may be extended by them to any time not exceeding thirty days longer.

"The Commission shall be bound to examine and decide upon every claim which may have been presented to it, or which shall hereafter be presented to it in accordance with this article, within one year from the 12th day of May 1881. Provided, however, that in any particular case in which delay in completing the defense shall make an extension for the claimant's proofs or final argument, or decision, beyond this period, necessary for justice, such extension may be granted, by the Arbitrators, or, on their disagreement by the Umpire."

"The Arbitrators shall have full power, subject to these stipulations, to make and publish convenient rules for carrying into effect this additional Article, and any disagreement with reference to such rules shall be decided by the Umpire."

If, therefore, you are of like opinion with me that the foregoing memorandum of the text of an additional article to the Agreement of February 12, 1871, correctly represents the accord we have reached in our recent verbal conferences, and will intimate to me, by note, your acceptance thereof, said additional article will be regarded by this Government (as also by that of Spain) as bearing date from the date of your note of acceptance, and as thereupon and thenceforth having like force and effect with the original agreement which it supplements.

Accept, &c.,

WM. M. EVARTS.

[Translation.]

LEGATION OF SPAIN,  
*Washington, February 23, 1881.*

The undersigned, envoy extraordinary and minister plenipotentiary of His Catholic Majesty, has the honor to acknowledge the receipt of the note which the Honorable Secretary of State has this day been pleased to address to him stating, with perfect correctness, the result of the conference held with the view of reaching an understanding with regard to the desire of the government of His Majesty the King, which was expressed in the note of the minister of state to the representative of the United States at Madrid (said note being dated July 5, 1880), to fix a term for the labors of the Spanish-American Commission of Arbitration which was appointed in pursuance of the convention of February 12, 1871.

The undersigned shares the views entertained by the Honorable Secretary in respect to the form in which it will be proper to express the understanding adopted in said conferences, and he hereby signifies his entire assent to the terms in which the Honorable Secretary of the State is pleased to express it in the following additional article to the convention of 1871, which will be considered by the Government of Spain and that of the United States, from this date, as having the same force and effect as the aforesaid convention:

"VIII. All claims for injuries done to citizens of the United States by the authorities of Spain in Cuba since the 1st day of October, A. D. 1868, which have not heretofore been presented by the Government of the

United States to the Commission now sitting in Washington under the agreement of February 12, 1871, shall be so presented to the said Commission within sixty days from this twenty-third day of February, 1881, unless in any case where reasons for delay shall be established to the satisfaction of the arbitrators; and in any such case the period for presenting the claim may be extended by them to any time not exceeding thirty days longer.

"The Commission shall be bound to examine and decide upon every claim which may have been presented to it, or which shall hereafter be presented to it in accordance with this article, within one year from the 12th day of May 1881: Provided, however, that in any particular case in which delay in completing the defence shall make an extension for the claimant's proofs or final arguments or decision, beyond this period, necessary for justice, such extension may be granted by the Arbitrators, or in their disagreement by the Umpire.

"The Arbitrators shall have full power, subject to these stipulations, to make and publish convenient rules for carrying into effect this additional article, and any disagreement with reference to such rules shall be decided by the Umpire."

The undersigned avails himself of this occasion to reiterate to the Honorable William M. Evarts the assurances of his highest consideration.

FELIPE MENDEZ DE VIGO.

*Protocol extending the time for the termination of the claims commission under the agreement of February 12, 1871, to January 1, 1883.*

[Signed May 6 and December 14, 1882.]

Protocol of a conference between the Honorable Frederick T. Frelinghuysen, Secretary of State of the United States, and His Excellency Francisco Barca, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the King of Spain, held at the Department of State in Washington on the sixth day of May eighteen hundred and eighty-two.

Mr. Frelinghuysen handed to Mr. Barca the following paper, entitled "Article IX," and said that it embodied the results of several preliminary conferences between himself and Mr. Barca relating to the prolongation of the Spanish American Claims Commission until the first day of January next:

ARTICLE IX. It being impossible for the Commission, in consequence of the death of the Arbitrator and of the Advocate on the part of the United States, to examine and decide within one year from the 12th. of May 1881 each and every claim which has been presented, it is agreed that the term aforesaid be extended to the 1st. of January 1883, for the sole purpose of permitting the Commission to examine and decide the claims actually pending.

And it is further agreed to this end

1st. That no evidence in any case shall be received after the 15th day of June next.

2nd. That no printed or written brief or argument before the Arbitrators shall be filed on behalf of any claimant after the 15th day of July 1882.

3rd. That no printed or written brief or argument shall be filed in reply on behalf of Spain after the 15th day of September 1882.

4th. That no oral arguments shall be heard by the Arbitrators after the 1st day of November 1882.

5th. That no arguments either written or oral shall be made before the Umpire except on his written request addressed to the Commission, specifying the time within which he will hear or receive said arguments.

6th. That the Arbitrators may establish in accordance with the preceding stipulations convenient rules for the better and more rapid despatch of the business of the Commission, and any disagreement which may arise between them as to those rules or their interpretation, shall be decided by the Umpire.

Decisions in every pending case shall be given by both Arbitrators before the 15th day of December next: jointly if they agree, separately when they disagree.

All cases in which on that day the two Arbitrators shall not have agreed, or in which neither Arbitrator shall have rendered a decision, shall go to the Umpire.

All cases in which the American arbitrator shall have failed to give a decision shall be rejected or allowed, as the case may be, in the form determined by the decision of the Arbitrator of Spain if the Spanish Arbitrator shall have given a decision: and *vice versa* all cases in which the Spanish Arbitrator shall have failed to give a decision shall be allowed or rejected, as the case may be, in the form determined by the decision of the American Arbitrator if the American Arbitrator shall have given a decision: it being the purpose of both parties to have the work of the Arbitrators finished before December 15, 1882.

The Umpire is requested to render decisions before January 1, 1883, in all cases submitted to him in order that the work of the Commission may cease on that day. But if the Umpire fails to comply with this request, decisions rendered by him after that day shall be respected by both parties, notwithstanding that the Commission shall be deemed to be terminated and dissolved after the 1st day of January 1883.

Mr. Barca observed that the Article as reduced embodied correctly the understanding between himself and Mr. Frelinghuysen.

In testimony whereof we have interchangeably signed this protocol.

FREDK. T. FRELINGHUYSEN.

FRANCISCO BARCA.

*Protocol of an agreement concluded between Mr. John Davis, Acting Secretary of State of the United States, and Don Francisco Barca, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the King of Spain, signed the 2nd day of June 1883.*

The undersigned, in view of the Spanish-American Commission of arbitration having concluded its labors on the 31st of December last in conformity with the provisions of the protocol of the 6th of May 1882, after having conferred on the subject, and being sufficiently empowered thereto by their respective governments, have agreed upon the following:

*First:* The Department of State of the United States will preserve in its archives the originals of the judgments pronounced by the Commission

of Arbitration, giving a duly certified copy of each one of said judgments to the Legation of Spain.

The books, reports and other documents of the dissolved Commission shall be divided between the Department of State and the Legation of His Majesty the King of Spain.

*Second:* On the 30th day of the present month of June, Mr. Eustace Collett, late Secretary of the said Commission, and who at the present time is charged with the arrangement and division of its papers, shall complete his labors, delivering to each of the respective governments the documents, books and papers referred to in the preceding paragraph first.

*Third:* The Governments of the United States of America and of His Majesty the King of Spain recognizing the zeal, uprightness, and impartiality with which Count Lewenhaupt has given his services during nearly three years as Umpire, hereby agree that the Government of His Majesty the King of Spain shall pay to Count Lewenhaupt the salary or compensation to which he is entitled according to the 6th article of the agreement of February 12, 1871, and that the Government of the United States will give to him a suitable present, both of these, the salary as well as the present, to be given in the name of the two contracting parties.

*Fourth:* The Government of the United States and that of His Catholic Majesty, desiring at the same time to present a testimonial of their thanks to Baron Carl Lederer, Mr. A. Bartholdi and Baron A. Blanc, for the zeal, impartiality and uprightness with which they in turn filled in past years the same delicate office of Umpire, hereby agree to offer to each of the three gentlemen mentioned a present consisting of a work of silver or of art, the cost of which shall be defrayed in equal moieties by the two governments.

*Fifth:* The payment of salary due to Count Lewenhaupt and the presents which are to be made to him as well as to his predecessors shall not prejudice in any manner the question touching the payment of the expenses of the dissolved Spanish and American Commission of Arbitration, or any other question pending between the two countries.

In testimony whereof, the undersigned have signed and sealed the present Protocol in the city of Washington, this 2nd day of June, A. D. 1883.

JOHN DAVIS. [SEAL.]

FRANCISCO BARCA. [SEAL.]

#### VENEZUELA.

##### *Convention for the settlement of claims against Venezuela.*

[Concluded April 25, 1866; ratifications exchanged at Caracas April 17, 1867; proclaimed May 29, 1867.]

The conclusion of a convention similar to those entered into with other republics, and by which the pending American claims upon Venezuela might be referred for decision to a mixed commission and an umpire, having been proposed to the Venezuelan Government on behalf of the United States of America, as a means of examining and justly terminating such claims; and it having been thought that the adoption of the contemplated course will secure at least some of the advantages attending arbitration, so strongly recommended in article the 112th of the Federal Constitution of Venezuela, while it will preserve unimpaired, as reciprocally

desired, the good understanding of both nations: The Citizen First Vice-President in charge of the Presidency has accepted the above proposal, and authorized the Minister for Foreign Relations to negotiate and sign the proper convention. Thereupon said Minister and Mr. E. D. Culver, Minister Resident of the United States of America, also duly empowered for that purpose, have agreed upon the following articles of convention:

ARTICLE I. All claims on the part of corporations, companies, or individuals, citizens of the United States, upon the Government of Venezuela, which may have been presented to their Government, or to its legation in Caracas, shall be submitted for examination and decision to a mixed commission, consisting of two members, one of whom shall be appointed by the Government of the United States, and the other by that of Venezuela. In case of death, absence, resignation, or incapacity of either of the Commissioners, or in the event of either of them omitting or ceasing to act, the Government of the United States or that of Venezuela, respectively, or the Minister of the United States in Caracas, by authority of his Government, shall forthwith proceed to fill the vacancy.

The Commissioners so named shall meet in the city of Caracas within four months from the exchange of the ratifications of this convention; and, before proceeding to business, they shall make solemn oath that they will carefully examine and impartially decide according to justice, and in compliance with the provisions of this convention, all claims submitted to them, and such oath shall be entered on the record of their proceedings.

The Commissioners shall then proceed to appoint an Umpire to decide upon any case or cases concerning which they may disagree, or upon any point of difference that may arise in the course of their proceedings. And if they cannot agree in the selection, the Umpire shall be named by the Diplomatic Representative either of Switzerland or of Russia, in Washington, on the previous invitation of the high contracting parties.

ARTICLE II. So soon as the Umpire shall have been appointed, the Commissioners shall proceed, without delay, to examine the claims which may be presented to them under this convention; and they shall, if required, hear one person in behalf of each Government on every separate claim. Each Government shall furnish, on request of either Commissioner, all such documents and papers in its possession, as may be deemed important to the just determination of any claim.

In cases where they agree to award an indemnity, they shall determine the amount to be paid, and issue certificates of the same. In cases when the Commissioners cannot agree, the points of difference shall be referred to the Umpire, before whom each of the Commissioners may be heard, and whose decision shall be final.

The Commissioners shall make such decision as they shall deem, in reference to such claims, conformable to justice, even though such decisions amount to an absolute denial of illegal pretensions, since the including of any such in this convention is not to be understood as working any prejudice in favor of any one, either as to principles of right or matters of fact.

ARTICLE III. The Commissioners shall issue certificates of the sums to be paid to the claimants, respectively, by virtue of their decisions or those of the Umpire, and the aggregate amount of all sums awarded by the Commissioners, and of all sums accruing from awards made by the Umpire, shall be paid to the Government of the United States. Payments of said sums shall be made in equal annual payments, to be completed within ten

years from the date of the termination of the labors of the commission; the first payment to be made six months from same date. Semiannual interest shall be paid on the several sums awarded at a rate of five per cent. per annum from the date of the termination of the labors of the commission.

ARTICLE IV. The commission shall terminate its labors in twelve months from the date of its organization, except that thirty days' extension may be given to issue certificates, if necessary, on the decisions of the Umpire in the case referred to in the following article. They shall keep a record of their proceedings, and may appoint a secretary.

ARTICLE V. The decisions of this commission and those (in case there may be any) of the Umpire, shall be final and conclusive as to all pending claims at the date of their installation. Claims which shall not be presented within the twelve months herein prescribed will be disregarded by both Governments, and considered invalid.

In the event that, upon the termination of the labors of said commission, there should remain pending one or more cases before the Umpire awaiting his decision, the said Umpire is authorized to make his decision and transmit same to the Commissioners, who shall issue their certificates thereupon and communicate [them \*] to each Government, which shall be held binding and conclusive; provided, however, that his decision shall be given within thirty days from the termination of the labors of the commission, and after the expiration of the said thirty days any decision made shall be void and of no effect.

ARTICLE VI. Each Government shall pay its own Commissioner, and shall pay one-half of what may [be \*] due the Umpire and secretary, and one-half the incidental expenses of the commission.

ARTICLE VII. The present convention shall be ratified, and the ratifications exchanged, so soon as may be practicable, in the city of Caracas.

In testimony whereof the Plenipotentiaries have signed this convention, and hereunto affixed the seals of the Ministry of Foreign Relations of the United States of Venezuela, and of the Legation of the United States of America, in Caracas, this twenty-fifth day of April, in the year one thousand eight hundred and sixty-six.

*The Minister Resident of the United States of America,*

[SEAL.]

E. D. CULVER.

*The Minister of Foreign Relations of the United States of Venezuela,*

[SEAL.]

RAFAEL SELJAS.

*Convention for a re-opening of the claims of citizens of the United States against Venezuela under the treaty of April 25, 1866.*

[Concluded December 5, 1885; ratifications exchanged at Washington June 2, 1889; proclaimed June 4, 1889.]

The President of the United States of America having on the 3d. day of March 1883, approved the following Joint Resolution of Congress: (Public Resolution No. 26.)

"Joint Resolution providing for a new Mixed Commission in accordance with the treaty of April twenty-fifth, eighteen hundred and sixty-six, with the United States of Venezuela.

"Whereas since the dissolution of the mixed Commission appointed under the treaty of April twenty fifth, eighteen hundred and sixty-six,

with the United States of Venezuela, serious charges, impeaching the validity and integrity of its proceedings, have been made by the Government of the United States of Venezuela, and also charges of a like character by divers citizens of the United States of America, who presented claims for adjudication before that tribunal; and

“Whereas, the evidence to be found in the record of the proceedings of said Commission, and in the testimony taken before Committees of the House of Representatives in the matter, tends to show that such charges are not without foundation; and

“Whereas it is desirable that the matter be finally disposed of in a manner that shall satisfy any just complaints against the validity and integrity of the first Commission, and provide a tribunal under said treaty constructed and conducted so as not to give cause for just suspicion; and

“Whereas, all evidence before said late Commission was presented in writing and is now in the archives of the State Department; and

“Whereas, the President of the United States has, in a recent communication to Congress, solicited its advisory action in this matter:

“Therefore—

*“Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he hereby is, requested to open diplomatic correspondence with the Government of the United States of Venezuela, with a view to the revival of the general stipulations of the treaty of April 25th, 1866, with said government, and the appointment thereunder of a new Commission, to sit in the city of Washington, which Commission shall be authorized to consider all the evidence presented before the former Commission in respect to claims brought before it, together with such other and further evidence as the claimants, may offer; and from the awards that may be made to claimants, any moneys heretofore paid by the Department of State, upon certificates issued to them, respectively, upon awards made by the former Commission, shall be deducted, and such certificates deemed cancelled; and the moneys now in the Department of State received from the Government of Venezuela on account of said awards, and all moneys that may hereafter be paid under said treaty, shall be distributed pro rata in payment of such awards as may be made by the Commission to be appointed in accordance with this resolution.”*

And the proposal contemplated and authorized by the foregoing joint resolution of Congress having been made by the Government of the United States of America to the Government of the United States of Venezuela, and accepted by the latter through its diplomatic representative in Washington; The Government of the United States of America and the Government of the United States of Venezuela, to the end of effecting by means of a convention arrangements for the execution of the accord thus reached between the two Governments, have named their Plenipotentiaries to confer and agree thereupon, as follows:

The President of the United States of America, Thomas F. Bayard, Secretary of State of the United States of America; and

The President of the United States of Venezuela, Antonio M. Soteldo, Chargé d’Affaires of Venezuela at Washington;

Who after having communicated to each other their respective full

powers, found in good and due form, have agreed upon the following articles:

ARTICLE I. The general stipulations of the Convention of April 25th 1866, between the contracting parties are hereby revived with such alterations as are required in conformity with the aforesaid joint resolution of the Congress of the United States, and with such further modifications as are deemed necessary for the certain and speedy accomplishment of the ends in view, and for the reciprocal protection of the interests of the high contracting parties as hereinafter provided.

ARTICLE II. All claims on the part of corporations, companies, or individuals, citizens of the United States, upon the Government of Venezuela, which may have been presented to their Government or to its legation at Caracas, before the first day of August 1868, and which by the terms of the aforesaid convention of April 25th, 1866, were proper to be presented to the Mixed Commission organized under said convention shall be submitted to a new Commission, consisting of three Commissioners one of whom shall be appointed by the President of the United States of America, one by the Government of the United States of Venezuela and the third shall be chosen by these two Commissioners; if they cannot agree within ten days from the time of their first meeting as hereinafter provided, then the diplomatic representative of either Russia or Switzerland at this capital shall be requested by the Secretary of State and the Venezuelan Minister at Washington to name the third Commissioner.

In case of the death, resignation or incapacity of any of the Commissioners, or in the event of any of them omitting or ceasing to act, the vacancy shall be filled within three months by naming another Commissioner in like manner as herein provided for the original appointment.

ARTICLE III. The Commissioners so appointed shall meet in the city of Washington at the earliest convenient time within three months from the exchange of the ratifications of this Convention, and shall, as their first act in so meeting, make and subscribe a solemn declaration that they will carefully examine and impartially decide, according to justice and in compliance with the provisions of this Convention, all claims submitted to them in conformity herewith, and such declaration shall be entered on the record of their proceedings.

ARTICLE IV. The concurring judgment of any two Commissioners shall be adequate for every intermediate decision arising in the execution of their duty, and for every final decision or award.

ARTICLE V. So soon as the Commission shall have organized, notice shall be given to the respective Governments of the date of organization and of readiness to proceed to the transaction of the business of the Commission.

The Commissioners shall thereupon proceed without delay to hear and examine all the claims which by the terms of the aforesaid Convention of April 25, 1866, were proper to be presented to the Mixed Commission organized under the Convention of April 25, 1866; and they shall to that end consider all the evidence admissible under the aforesaid Convention of April 25, 1866, in respect to claims adjudicable thereunder, together with such other and further evidence as the claimants may offer through their respective Governments, and such further evidence as may be offered to rebut any such new evidence offered on the part of the claimant, and they shall, if required, hear one person on behalf of each Government on every separate claim.



All the papers and evidence before the said former Commission, now on file in the archives of the Department of State at Washington, shall be laid before the Commission; and each Government shall furnish, at the request of the Commissioners, or of any two of them, all such papers and documents in its possession as may be deemed important to the just determination of any claim.

ARTICLE VI. The Commissioners shall make such decision as they shall deem, in reference to such claims, conformable to justice.

The concurring decisions of the three Commissioners, or of any two of them, shall be conclusive and final. Said decisions shall in every case be given upon each individual claim, in writing, stating in the event of a pecuniary award being made, the amount or equivalent value of the same, expressed in gold coin of the United States of America; and in the event of interest being allowed for any cause and embraced in such award, the rate thereof and the period for which it is to be computed shall be fixed, which period shall not extend beyond the close of the Commission; and said decision shall be signed by the Commissioners concurring therein.

In all cases where the Commissioners award an indemnity as aforesaid, they shall issue one certificate of the sum to be paid to each claimant, respectively, by virtue of their decisions, inclusive of interest when allowed, and after having deducted from the sum so found due to any claimant or claimants any moneys heretofore paid by the Department of State at Washington upon certificates issued to such claimants, respectively, upon awards made by the former Mixed Commission under the Convention of April 25th, 1866. And all certificates of awards issued by the said former Mixed Commission shall be deemed cancelled from the date of the decision of the present Commission in the case in which they were issued.

The aggregate amount of all sums awarded by the present Commission, and of all sums accruing therefrom, shall be paid to the United States. Payment of said aggregate amount shall be made in equal annual payments to be completed within ten years from the date of the termination of the labors of the present Commission. Semi-annual interest shall be paid on the aggregate amount awarded, at the rate of five per cent. per annum from the date of the termination of the labors of the Commission.

ARTICLE VII. The moneys now in the Department of State actually received from the Government of Venezuela on account of the awards of the said former Mixed Commission under the convention of April 25, 1866, and all moneys that may hereafter be paid on said former account by the Government of Venezuela to the Government of the United States shall be credited to the Government of Venezuela in computing the aggregate total which may be found due to the Government of the United States under the stipulations of the preceding article, and the balance only shall be considered as due and payable with interest in ten annual payments as aforesaid. *Provided however*, That in the event of the aggregate amount which the present Commission may find due to the Government of the United States being less than the aggregate of the sums actually received from the Government of Venezuela, and remaining undistributed in the Department of State, at Washington, the Government of the United States will refund such excess to the Government of Venezuela within six months from the conclusion of the labors of the Commission.

The payment of moneys due from the Government of Venezuela to the Government of the United States under the former Convention of April 25, 1866, shall be deemed to have ceased from the first day of April 1883, to be resumed should occasion arise as hereinbefore provided.

ARTICLE VIII. In the event of the annulment of any awards made by the former Mixed Commission under the Convention of April 25, 1866, the Government of the United States is not to be regarded as responsible to that of Venezuela for any sums which may have been paid by the latter Government on account of said awards, so far as said sums may have been distributed. In like manner, if the awards made by the present Commission and the certificates issued by it shall in any cases be found less than the amount heretofore paid to the claimants from the moneys received from Venezuela, the Government of the United States shall not be regarded as responsible by reason thereof to the Government of Venezuela.

The rehearing provided in the present convention affects, as against the Government of the United States, only the installments of moneys paid to and now held by the United States, and those hereafter to be paid; and the effect of such annulment or reduction in any case shall be to discharge the Government of Venezuela, wholly and forever, from any obligation to pay further installments in such case, except as provided in the present convention.

ARTICLE IX. It is further agreed that if the Commission, hereunder organized shall in whole or part annul any money awards made in any cases by the former Mixed Commission under the Convention of April 25, 1866, it shall be the duty of the Commission to examine and decide whether, under all the circumstances, and with due regard to principles of justice and equity there are any third parties who have, with the observance of due care and diligence, become possessed, prior to the date of the exchange of ratifications hereof, for a just and valuable consideration, of any portion of the certificates of award heretofore issued in said claims, and whether, under the constitution or laws of either of the contracting parties, said third parties have acquired vested rights, by virtue of the awards of the former Commission under the convention of 1866, imposing the duty on the Government of the United States to collect from Venezuela the amount or proportion of said certificates of awards which may be held and owned by third parties.

If the present Commission shall decide that there are third parties who are possessed of vested rights, then it shall examine and ascertain the sum paid by each and all of said third parties for their respective interests or shares in said awards, and shall fix the amount of their said interest in said certificates of award or each of them, and shall issue new certificates of award for the sums so adjudged due, which shall be paid by Venezuela to the United States in the manner hereinbefore stipulated, the same as all other certificates issued by the present Commission.

ARTICLE X. Upon the conclusion of the labors of the Commission organized in virtue of this present Convention, the Department of State of the United States of America shall distribute pro rata among the holders of the certificates which may be issued under the present convention, the moneys in the Department of State actually received from the Government of Venezuela on account of the awards of the former Mixed Commission under the Convention of April 25, 1866; and all moneys that may hereafter be paid to the United States under this present convention shall be in like

manner distributed pro rata in payment of such awards as may be made under this present convention.

ARTICLE XI. The decisions of the Commission organized under this present convention shall be final and conclusive as to all claims presented or proper to be presented to the former Mixed Commission.

ARTICLE XII. The Commission appointed under this present convention shall terminate its labors within twelve months from the date of its organization. A record of the proceedings of the Commission shall be kept, and the Commissioners may appoint a Secretary.

ARTICLE XIII. Notwithstanding that the present Commission is organized in consequence of representations made by the Government of Venezuela and that it deals solely with the claims of citizens of the United States (for which reasons the United States might properly claim that all the expenses hereunder should be borne by Venezuela alone), it is agreed that, in continuation of the arrangement made in the former convention of 1866, the expenses shall be shared as follows: Each Government shall pay its own Commissioner and shall pay one-half of what may be due to the third Commissioner and the Secretary, and one-half of the incidental expenses of the Commission.

ARTICLE XIV. Except so far as revived, continued, modified and replaced by the terms and effects of this present convention, the effects of the former convention of April 25, 1866, shall absolutely cease and determine from and after the date of the exchange of ratifications of this present convention, and the high contracting parties hereby agree that the responsibilities and obligations arising under said former convention shall be deemed wholly discharged and annulled by the substitution therefor of the responsibilities contracted and obligations created under this present convention, to which the high contracting parties mutually bind themselves to give full, perfect and final effect, without any evasion, reservation or delay whatever.

ARTICLE XV. The present convention shall be ratified by the President of the United States by and with the advice and consent of the Senate of the United States of America; and by the President of the United States of Venezuela by and with the advice and consent of the Senate of the United States of Venezuela, and the ratifications shall be exchanged at Washington within twelve months from the date of this present convention, and the publication of the exchange of ratifications shall be notice to all persons interested.

In testimony whereof the respective plenipotentiaries have hereunto affixed their signatures and seals.

Done in duplicate, in the English and Spanish languages, at the city of Washington, this 5th day of December 1885.

T. F. BAYARD. [SEAL]

A. M. SOTELDO. [SEAL]

*Convention between the United States and Venezuela to remove doubts as to the meaning of the convention signed December 5, 1885.*

[Concluded March 15, 1888; ratifications exchanged at Washington June 3, 1889; proclaimed June 4, 1889.]

Whereas doubts have arisen in respect of the true intent and meaning of Article IX. of the treaty between the United States of America and the United States of Venezuela signed at Washington on the fifth day of December 1885, and, in consequence of such ambiguities, the exchange of

ratifications of said treaty has not taken place within the period therein prescribed for such exchange;

And, whereas, the High Contracting Parties are desirous of removing all doubts in respect of the meaning and intent of said Article, and of extending the time for the exchange of ratifications of said treaty, to the end of reaching an amicable and honorable solution of the difficulties that now impair their good relations;

The Government of the United States of America and the Government of the United States of Venezuela, have named as their Plenipotentiaries to conclude a Convention for that purpose: the President of the United States of America, Thomas F. Bayard, Secretary of State of the United States of America; and the President of the United States of Venezuela, José Antonio Olavarria, Chargé d'Affaires of Venezuela at Washington; who, after reciprocal communication of their full powers, found in due and good form, have agreed upon the following Articles:

ARTICLE I. It is understood and agreed that in the event of any of the awards of the Mixed Commission under the Convention of April 25, 1866, being annulled in whole or in part by the Commission authorized and created by Article II. of the treaty of December 5, 1885, no new award shall in any case be made by said Commission, to the holders of certificates of any award or awards annulled as aforesaid, in excess of the sum which may be found to be justly due to the original claimant.

ARTICLE II. The time fixed for the exchange of the ratifications of the aforesaid treaty between the United States and Venezuela signed at Washington on the fifth day of December, A. D. one thousand eight hundred and eighty-five, is hereby extended to a period not exceeding five months from the date of this Convention or sooner if possible.

ARTICLE III. The present Convention shall be ratified by the President of the United States of America by and with the advice and consent of the Senate thereof, and by the President of the United States of Venezuela by and with the advice and consent of the Congress thereof, and the ratifications shall be exchanged at Washington as soon as possible within the time specified in Article II. hereof as the period of extension of the time for the exchange of ratifications of the treaty signed at Washington on the fifth day of December, 1885.

In witness whereof the respective plenipotentiaries have signed and sealed the present Convention in duplicate.

Done at Washington this 15th day of March, A. D. 1888.

T. F. BAYARD. [SEAL.]

J. A. OLAVARRIA. [SEAL.]

*Supplementary Convention between the United States of America and Venezuela, to further extend the period fixed for the exchange of ratifications of the Convention of December 5, 1885, and to extend the period for the exchange of the ratifications of the Convention of March 15, 1888.*

[Concluded October 5, 1888; ratifications exchanged at Washington June 3, 1889; proclaimed June 4, 1889.]

Whereas, by Articles I. and II. of a Convention, signed and concluded by the respective Plenipotentiaries of the United States and Venezuela, in the city of Washington, on the 15th day of March 1888, it was provided that the time fixed by the Convention between the said parties, signed and

concluded December 5, 1885, for the exchange at Washington of the ratifications thereof, should be extended to a period not exceeding five months from the date of said Convention, to wit, from the 15th day of March 1888, or sooner if possible, and that the ratifications of the said Convention of March 15th, 1888, should in like manner be exchanged at Washington within the same period;

And whereas the period, as aforesaid prescribed, elapsed on the 15th day of August 1888 without such exchange having been effected;

And whereas it appears that the Congress and Government of Venezuela did, according to the Constitutional forms of that Republic, ratify and confirm the said Conventions at Caracas on the 27th day of July 1888, and that the President of the Republic of Venezuela did on the 2d day of August 1888, fully empower the Representative of that Republic in the United States to exchange ratifications thereof with whoever should be duly authorized on behalf of the United States;

And whereas the said Conventions having been theretofore duly ratified by the President of the United States, by and with the advice and consent of the Senate thereof, the Secretary of State of the United States, duly empowered by the President of the United States, was ready on and before the said 15th day of August 1888 to effect the exchange of ratifications of the said Conventions as stipulated;

And whereas, by reason of unavoidable delay, the copy of the said Convention ratified by the Government of Venezuela as aforesaid and the necessary powers to enable the Representative of that Government in the United States to make exchange of ratifications could not be produced in the city of Washington, D. C., until after the expiration of the period so as aforesaid stipulated for the exchange of ratifications;

Now, therefore, the Governments of the United States and Venezuela, being desirous of completing and putting in force the two Conventions aforesaid at the earliest day possible, have respectively named as their Plenipotentiaries to conclude a Convention for that purpose,

The President of the United States of America, Thomas F. Bayard, Secretary of State of the United States of America,

And the President of the United States of Venezuela, Francisco Antonio de Silva, Chargé d'Affaires of the United States of Venezuela at Washington;

Who, after reciprocally satisfying each other in good and due form of their competency to negotiate to such end, have agreed upon the following Articles:

ARTICLE I. The time fixed, by Articles I. and II. of the Convention between the Contracting Parties, signed at Washington, the 15th day of March 1888, within which to effect the exchange of the ratifications of the Convention between said parties signed at Washington, on the 5th day of December, 1885, and also of the said Convention of the 15th day of March 1888, is hereby extended to a period not exceeding ten months from the 15th day of August one thousand eight hundred and eighty-eight, or sooner if possible.

ARTICLE II. The present Convention shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof; and by the President of the United States of Venezuela, by and with the advice and consent of the Congress thereof; and

the ratifications shall be exchanged at Washington, as soon as possible within the time specified in Article I. hereof as the period of extension of the time for the exchange of ratifications of the Convention signed at Washington, on the 5th day of December 1885, and of the Convention signed at Washington on the 15th day of March 1888.

In witness whereof, the respective Plenipotentiaries have signed and sealed the present Convention in duplicate, in the English and Spanish languages.

Done at Washington, this fifth day of October, in the year of our Lord, one thousand eight hundred and eighty-eight.

T. F. BAYARD. [SEAL.]

Fco. ANT<sup>o</sup>. SILVA. [SEAL.]

*Convention for the arbitration of the claim of the Venezuela Steam Transportation Company.*

[Signed January 19, 1892; ratifications exchanged at Washington, July 28, 1894; proclaimed July 30, 1894.]

The Government of the United States of America and the United States of Venezuela, being mutually desirous of removing all causes of difference between them in a manner honorable to both parties and in consonance with their just rights and interests, have resolved to submit to arbitration the claim of the "Venezuela Steam Transportation Company", and have respectively named as their plenipotentiaries to conclude a Convention for that purpose:—

The President of the United States of America, William L. Scrnggs, Envoy Extraordinary and Minister Plenipotentiary of the United States at Caracas;

And the President of the United States of Venezuela, Doctor Rafael Seijas, legal adviser for the Department of Foreign Relations;

Who, after having exhibited their respective full powers, found in good and due form, have agreed upon the following Articles:—

ARTICLE I. The high contracting parties agree to submit to arbitration the question whether any, and, if any, what indemnity shall be paid by the Government of the United States of Venezuela to the Government of the United States of America for the alleged wrongful seizure, detention and employment in war or otherwise of the Steamships *Hero*, *Nutrias* and *San Fernando*, the property of the "Venezuela Steam Transportation Company", a corporation existing under the laws of the State of New York, and a citizen of the United States, and the imprisonment of its officers, citizens of the United States.

ARTICLE II. The question stated in Article I. shall be submitted to a board of three Commissioners, one to be appointed by the President of the United States of America, one by the President of the United States of Venezuela, and the third who shall not be either an American or a Venezuelan citizen, to be chosen by the two appointed as aforesaid; but if, within ten days from the time of their first meeting as hereinafter provided, they cannot agree upon the third Commissioner, the Secretary of State of the United States and the Venezuelan Minister at Washington

shall forthwith request either the Diplomatic representative of Belgium or that of Sweden and Norway at that capital to name him subject to the restriction aforesaid.

The Commissioners to be chosen by the President of the United States of America and the President of the United States of Venezuela shall be appointed within a month from the date of the exchange of the ratifications of this Convention.

In case of the death, resignation or incapacity of any of the Commissioners, or in the event of any of them ceasing or omitting to act, the vacancy shall be filled in the same manner as is herein provided for the original appointment.

ARTICLE III. The Commissioners appointed by the President of the United States of America and the President of the United States of Venezuela shall meet in the city of Washington at the earliest convenient moment within three months from the date of the exchange of the ratifications of this Convention, and shall proceed to the selection of a third Commissioner.

When such commissioner shall have been chosen, either by agreement between the two first named; or in the alternate manner hereinbefore provided, the three Commissioners shall meet in the city of Washington at the earliest practicable moment within five months from the date of the exchange of the ratifications of this Convention, and shall subscribe, as their first act, a solemn declaration to examine and decide the claim submitted to them in accordance with justice and equity and the principles of international law.

The concurrent judgment of any two of the Commissioners shall be adequate for the decision of any question that may come before them, and for the final award.

ARTICLE IV. The Commissioners shall decide the claim on the Diplomatic correspondence between the two Governments relative thereto, and on such legal evidence as may be submitted to them by the high contracting parties within two months from the date of the first meeting of the full Commission.

Their decision shall be rendered within three months at farthest from the date of such first meeting, and shall be final and conclusive.

They shall hear one person as Agent in behalf of each Government and consider such arguments as either of such persons may present; and may, in their discretion, hear other counsel either in support of or in opposition to the claim.

ARTICLE V. If the award shall be in favor of the United States of America, the amount of the indemnity, which shall be expressed in American gold, shall be paid in cash at the city of Washington, in equal annual sums, without interest, within five years from the date of the award, the first of the five payments to be made within eight months from that date. Each Government shall pay its own commissioner and agent, and all other expenses including clerk hire shall be borne by the two Governments in equal moieties.

ARTICLE VI. This Convention shall be ratified by the President of the United States of America by and with the advice and consent of the Senate thereof; and by the President of the United States of Venezuela, with

the approval of the Congress thereof; and the ratifications shall be exchanged at Washington as soon as possible.

In witness whereof, the respective plenipotentiaries have signed and sealed the present Convention in duplicate, in the English and Spanish languages.

Done at Caracas this nineteenth day of January, in the year of our Lord one thousand eight hundred and ninety-two.

[SEAL]

• [SEAL]

WILLIAM L. SCRUGGS.

RAFAEL SELJAS.



## APPENDIX III.

### HISTORICAL NOTES.

#### 1. ARBITRATION PRIOR TO THE NINETEENTH CENTURY.

"In ancient times,<sup>1</sup> when war constituted the normal state of peoples and the foreigner was everywhere treated as an enemy, arbitrations were necessarily rare, and we do not find either a general system or harmonious rules governing the subject. There were a few cases of arbitration in the East and in Greece, but the mode of procedure was not suited to the temperament of the people, and, after the peace of Rome was established, with the civilized world under one government, there was no place for it, since arbitration presupposes a conflict between independent states.

"In the Middle Ages, owing to the peaceful influence of the church, arbitrations were more frequent, and yet their influence was far from producing all the results which might have been expected, perhaps because Europe was then divided into a great number of petty states, or because the rude manners of the period were intolerant of the idea of conciliation.

"Later history does not present many cases of arbitration, for the ambition of princes does not, any more than did that of the Roman people, adapt itself to pacific remedies in conflicts in which they hope to gain an advantage by force of arms. Absolute monarchy is essentially warlike; it rarely turns aside from the objects which it pursues, although it has not, as Rome did, either forced its yoke on all nations, or fallen under the combined assaults of those whom it has sought to subjugate.

"Arbitration in the East and in Greece.—Exact historical ideas on the subject of international arbitration among the peoples of the East are somewhat deficient, and the saying that one ought to hesitate to risk himself on unsettled ground<sup>2</sup> seems applicable to our present subject. Here are two instances which appear exact enough. Herodotus relates that during the lifetime of Darius a contest arose between Artabazanes and Xerxes, and that Darius decided in favor of the latter. After the death of Darius, the judgment of the deceased King not being definitive, and the feelings of the people being somewhat divided, they consented to submit the matter to the decision of the uncle of the two pretenders, Artabanus or Artaphernes, who, in the capacity of a judge, decided in favor

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<sup>1</sup> The passages here quoted on arbitration in the East and in Greece, arbitration under the Roman Empire, and arbitration in the Middle Ages, are translated from a work of great merit, entitled *Traité Théorique et Pratique de l'Arbitrage International*, by M. A. Mérignhac, professor of international law in the faculty of law at Toulouse. The publisher of the work is M. L. Larose, 22, rue Soufflot, Paris.

<sup>2</sup> Laurent, *Etudes sur l'histoire de l'humanité*, I. 96.

of Xerxes.<sup>1</sup> Herodotus also relates that after the defeat of the Ionians, Artaphernes, Satrap of Sardis, sent for the deputies of the cities, and made them sign a contract, or a treaty, to the effect that in case of conflict they would settle it by law rather than by means of arms.<sup>2</sup>

"The Greeks often resorted to arbitration, but they practiced it among themselves and not with foreign nations, for, like other ancient peoples, they regarded foreigners as barbarians, and treated them as enemies. Besides, their arbitrations did not cover great political questions, for every Greek city preserved its independence with a jealous care. They related to disputes touching religion, commerce, boundaries,<sup>3</sup> and the possession of contested territories, especially of the numerous islands scattered among the Grecian seas. The following are some decisions by arbitration bearing on these different points:

"In the time of Solon, five Spartans were chosen to decide between the Athenians and the Megarians, on the subject of the possession of the Island of Salamis.<sup>4</sup> About the year 416 B. C., Argive judges acted as arbitrators as to certain islands of which the Cimolians and the Melians disputed the ownership.<sup>5</sup> The Etolians rendered an arbitral sentence on a question of boundary between the cities of Melite and Pera, in Thessaly.<sup>6</sup> Themistocles determined a dispute between the Corinthians and the Corcyraeans about Leucas, deciding that the peninsula should be held in common upon the payment of twenty talents by the Corinthians.<sup>7</sup> During the reign of Antigone the inhabitants of Lebedos, having been forced to leave their country, settled in Teos; and certain questions which arose between the old and the new people of the latter city were adjusted by the city of Mitylene, appointed as arbitrator by the King Antigone.<sup>8</sup>

"We may point out finally the arbitration of the Sicyonians, on the occasion of an unexpected difference between the Athenians and the Oropians, which arose in the following manner: The city of Oropus, which was situated on the confines of Bœtia and Attica, and which was the subject of a quarrel between the Bœtians and the Athenians, was allotted to the latter by Philip II. after the battle of Cheronea. Driven by necessity, says Pausanias, the Athenians pillaged the city to which they owed protection. The Oropians appealed to the Roman Senate, who delegated the Sicyonians as arbitrators, and they condemned the Athenians to pay five hundred talents as a penalty, which was reduced to one hundred, owing to the intercession of an embassy of three philosophers who were sent by Athens to Rome. This sum was not paid and the Oropians consented to receive an Athenian garrison, and to give hostages, reserving the right to recall them if they gave new grounds of complaint. This deceitful bargain, says Barbeyrac, was the occasion of a war which broke

<sup>1</sup> Barbeyrac, *Supplément au corps universel diplomatique*, I. 86.

<sup>2</sup> *Histoires*, VI. 42.

<sup>3</sup> Kamarowski, 115.

<sup>4</sup> Plutarque, *Vie de Solon*, No. 12; Laurent, II. 138.

<sup>5</sup> Egger, *Les traités publics chez les Grecs et les Romains*, 68; Le Bas, *Voyage archéologique*, V<sup>e</sup> partie, No. 1.

<sup>6</sup> Le Bas, II. No. 1179; Rangabé, *Antiquit. hellen.* II. No. 692.

<sup>7</sup> Barbeyrac, art. 125, p. 101.

<sup>8</sup> Le Bas, No. 86.

out later between the Romans and the Achæans—a war which entailed the loss of what was left of the liberty of Greece.<sup>1</sup>

“The procedure employed in the arbitrations of the Greeks was like that which is ordinarily observed. The agreement designated the arbitrator and the subject of the litigation; the arbitrator named the time and the place of the decision, and the parties sent commissioners to defend their cause. The arbitrator, who was bound in the most solemn manner scrupulously to discharge his trust, conducted the business with religious care, heard the interested parties, and received their proofs.<sup>2</sup> The sentence, drawn up in duplicate, was usually deposited in the temples or other public places, and both sides bound themselves by oaths to execute it.<sup>3</sup>

“Arbitration was regarded with favor both by the historians and by the statesmen of Greece. Thucydides praised it in his history of the Peloponnesian war, and mentions with approval the words of the King of Sparta, who said ‘It is impossible to attack as a transgressor him who offers to lay his grievance before a tribunal of arbitration.’<sup>4</sup> The employment of arbitrators, says M. Laurent, was a distinctive trait of the Greek race. Victors crowned with the pacific laurel, and poets also, had among the Greeks that influence which elsewhere accompanied rank and power.<sup>5</sup> It was for this reason that Pontarcus, a noted wrestler, served as an intermediary between the Eleans and the Achæans; that Pyttalus, victor of the Olympian games, filled the same rôle between the Arcadians and the Eleans; that the poet Simonides prevented an imminent war between Hiero, of Syracuse, and Theron, of Agrigentum. Sometimes friendly cities were chosen as arbitrators. The Oracle of Delphi was in several cases called on to decide disputes, and it readily counselled arbitration. Thus, in a discussion which arose in 550 between the Kings of the Cyrenians, it advised them to choose as arbitrator a citizen of Mantinea, and a certain man called Demonax was designated to discharge in that capacity the functions designated by the oracle.<sup>6</sup>

“The Greeks recognized the use of the arbitral clause, of which we will speak hereafter. A treaty of alliance between Argos and Lacedæmonia contained at the end a clause which provided that, if a contention should arise between the two allied cities, they should select an impartial city as arbitrator.<sup>7</sup> There was an agreement between the cities of Hyerapytna and Priansus which stipulated that, ‘in regard to the injuries already done on either side, Enipan and Neon, the “cosmes” or chief magistrates of Crete, should settle the disputes arising from these causes before a tribunal selected from each city. In regard to any future injuries they should commit they should employ lawyers prescribed in the order of the pub-

<sup>1</sup> Barbeyrac, No. 437, p. 397.

<sup>2</sup> Egger, 72.

<sup>3</sup> Schoemann, *Antiquités grecques*, traduction Galuski, II. 6.

<sup>4</sup> *Histoire de la guerre du Péloponèse*, L. I. ch. 85.

<sup>5</sup> Laurent, II. 138.

<sup>6</sup> Barbeyrac, I. 58.

<sup>7</sup> Egger, 66 and 67; Barbeyrac, I. 156; Grotius, *Le Droit de la guerre et de la paix*, édition Barbeyrac, II. 173, notes; *Pandectes française*, V. Arbitrage international, No. 11.

lic edict.' The 'cosmes' should also indicate the city from which both parties should appoint the arbitrators.<sup>1</sup>

"Arbitration under the Roman Empire.—The Greek states, as we have seen, had recourse to arbitration only among themselves. Rome, on the other hand, never consented to arbitrate her disputes with neighboring countries. Like Greece, in this respect, she regarded the foreigner as an enemy; and from her origin to the culmination of her greatest splendor she aspired to universal dominion, and devoted to that end her foreign policy. If she made treaties of peace, of friendship, or of alliance with other peoples, it was always with the hope of subjection at some future time.<sup>2</sup> The Roman state was afraid that it might see itself impeded in its projects of conquest by a decision conforming to common right. Besides, the kingly people would have considered it an abasement to submit to the judgment of another power. When the Rhodians proposed their mediation to keep Perseus on the throne the Senate received their proposition with sovereign contempt; and Titus Livius says that, even in his time, the very remembrance of the incident excited indignation.<sup>3</sup> Nations formerly most tenacious of their independence, and who nominally were living in freedom, were the first to prostrate themselves before the grandeur of Rome, hoping to avert by their complete humility their future servitude. The pretension of Rome to be superior to other nations, which is the very negation of the idea of arbitration, realized itself completely when she became mistress of the world. Peoples lying dormant in the peace of Rome could no longer assume to formulate against her demands to be submitted to arbitrators. Equal rights, which might lead to conflicts, could not exist between a sovereign and his subjects, and they could only present petitions. In truth, the Senate at first,<sup>4</sup> the Emperor finally,<sup>5</sup> as absolute arbitrators of all claims, gave audience to all deputies of peoples who had petitions to present, and who came as supplicants to ask for justice, for example, against the exactions of the governors of provinces. They were also the natural judges of conflicts which might arise between the different peoples subject to Roman authority.<sup>6</sup> And the custom of taking the Senate as arbitrator was even introduced among independent nations, who were fascinated by the splendor of the Roman name. But it does not seem that the Romans played the rôle of arbitrator in very good faith, and their behavior might serve as a precedent for La Fontaine's fable, *The Oyster and the Advocates*. In one case the Romans were arbitrators of some question of boundary between the Aricans and the people of Ardea, and they decided the point at issue by seizing the disputed territory them-

<sup>1</sup> Barbeyrac, I. 283, No. 336; *Corpus inscript. græc.*, No. 2256.

<sup>2</sup> "Il fallait attendre, dit Montesquieu, qui toutes les nations fussent accoutumées à obéir comme libres et comme alliées, avant de leur commander comme sujettes, et qu'elles eussent été se perdre peu à peu dans la république romaine." Grandeur et décadence des Romains, Ch. VI. Conf. Despagne, Cours de droit int. public, 701-702.

<sup>3</sup> 44, 14.

<sup>4</sup> *Collectio inscript. lat.*, No. 3110.

<sup>5</sup> Sénèque, *De providentiâ*, cap. 4, § 13. Conf. Grotius et l'annotation de Barbeyrac, 173-174, notes.

<sup>6</sup> Conf. Ruggiero, *L'Arbitrage public chez les Romains*.

selves.<sup>1</sup> There was a similar case about 180 B. C. between Nola and Naples.<sup>2</sup> Cicero justly condemns this course, which he styles miserable trickery.<sup>3</sup> \* \* \*

"Arbitration in the Middle Ages and in more recent times.—The practice of arbitration seems to have obtained in the barbarian world. Procopius cites the example of the Gepidae proposing arbitration to the Lombards, and declaring it to be unjust to use violence toward those who demanded a judge.<sup>4</sup> Again, Cassiodorus relates that the ambassadors of Theodoric, King of the Ostro-Goths, carried letters from their master to the Kings of the Herulians and Varnes. Their mission was to beg those princes to join them and the envoys of Gondebaud in inviting Clovis, King of the Franks, to cease his wars against the Visigoths and to accept the arbitration of the united kings. This entreaty was not in vain, and Clovis consented to such an arrangement.<sup>5</sup>

"That which characterizes the period that followed the establishment of barbarians on the ruins of the Roman Empire was the great tie which Christianity created between nations bound together by one religious doctrine. The church at this time assumed a preponderating influence, and the bishops of Rome now became the real sovereigns of the Catholic world. Owing to the powerful impulse given to their action by Gregory VII., the popes by degrees accepted the idea that they were placed above sovereigns and were the representatives of God on earth. In virtue of their divine power the Roman pontiffs, recognized everywhere as the delegates of God, from whom all sovereignty emanates, constituted themselves judges of all cases and evoked to their tribunal all differences between peoples and kings.<sup>6</sup> Innocent III. declared that the pope was the sovereign mediator on earth.<sup>7</sup> When Philip Augustus opposed his claims he still more strongly affirmed the contested right, in virtue of the idea that peace is a duty of Christians and that the head of the church ought to have the power to impose it upon them.<sup>8</sup>

"While these claims belong to the order of ideas which especially prevail in the domain of conscience,<sup>9</sup> it cannot be denied that the Church powerfully contributed to the progress of civilization by embracing the cause of the weak against the strong, and by strengthening ideas of peace and concord, which were so rare in those days of violence and constant wars.<sup>10</sup> The principle of pontifical sovereignty had so entered into the manners of the times that Popes were often chosen also as voluntary arbitrators.<sup>11</sup> It has sometimes been said that their intervention, whether

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<sup>1</sup> Barbeyrac, I. 113, art. 145.

<sup>2</sup> Id. 373, art. 417.

<sup>3</sup> De officiis, I. X.

<sup>4</sup> Calvo, III. sec. 1710.

<sup>5</sup> Cassiodori opera, I. 158.

<sup>6</sup> De Maistre, Du Pape, liv. II. Ch. V.

<sup>7</sup> Registr. de negotio imperii, Epistola CLXXXV.

<sup>8</sup> Epistola, VI. 163.

<sup>9</sup> Bossuet, Defensio declarationis, III. 22.

<sup>10</sup> Conf. Chateaubriand, Le génie du christianisme, II. 6, Ch. XI.; Guizot, L'Église et la société chrétienne, C. XIV.; Laurent, VI. 202; Dreyfus, 22; Calvo, I. 13.

<sup>11</sup> Lacointa, introduction à l'ouvrage précité de M. Kamarowski, VIII.

spontaneous or specially invoked, was more frequently employed in matters of private interest and internal policy, than of actual international conflict.<sup>1</sup> This may have been so in many instances, but it cannot be denied that they were also called upon to decide litigations much more important, as certain examples will readily show. Popes Alexander III., Honorius III.,<sup>2</sup> John XXII.,<sup>3</sup> Gregory XI.,<sup>4</sup> were chosen as arbitrators in quarrels which agitated Europe; and Pope Alexander VI., by a decision of arbitration which is still celebrated, traced an imaginary line from pole to pole, dividing between the Spaniards and the Portuguese the possession of all countries discovered in the new world.<sup>5</sup> And even after the schism of England, when the Papacy had lost Teutonic and Gallo-Teutonic Europe, and when Gallo-Romanic Europe was itself formed,<sup>6</sup> the prestige of the Popes was still so great that it forced itself on the Poles and the Muscovites.<sup>7</sup>

"But acts of opposition, which began to appear on the part of kings before the XVI. century," were accentuated after that time, and the choice of the Pope as arbitrator became less frequent; and the interest of the Papacy in the cause which it had so ardently espoused in the Middle Ages became less effective. When, therefore, the treaty of Vervins of 1598 submitted to the arbitration of the reigning Pope the pretensions of the King of France, Henri III., and of Charles Emanuel, Duke of Savoy, to the Marquisate of Saluces, Clement VIII., worn out by the continued plots of Charles Emanuel, declared that he would resign his mission.<sup>8</sup> But we should not omit to mention, in the seventeenth century, the arbitration of Gregory XV. on the subject of the forts of the 'Valtelline';<sup>9</sup> and, also, in the eighteenth century, that of Pope Clement XI., who gave the casting vote as umpire between Louis XIV. and Leopold I., who were instituted as arbitrators by art. 8 of the treaty of Ryswick.<sup>11</sup>

<sup>1</sup> Pandectes françaises, No. 18.

<sup>2</sup> De Flasseau, *Histoire générale et raisonnée de la diplomatie française*, 2d ed. I. 113.

<sup>3</sup> Kervyn de Lettenhove, *Histoire de Flandre*, III. 85.

<sup>4</sup> Charles Benoist, *La Politique du roi Charles V.*, 110, 111, 115, 167, 169, 202, 204, 218.

<sup>5</sup> Conf. en sens divers sur la "ligne alexandrine:" Laurent, X. 422; Calvo, III. §1712; de Maistre, liv. II. Ch. XIV.; Raynal, *Histoire philosophique et politique des établissements et du commerce des Européens dans les deux Indes*, III. 287; Darras, *Histoire de l'Eglise*, III. 604; Grande encyclopédie, vu Arbitrage international, III. 556; de Portugal, *Considérations sur les limites des États*, 102; Despagnet, *Cours de droit int. public*, 702; Pradier-Fodéré, *Traité de droit int. public européen et Américain*, VI. No. 2604.

<sup>6</sup> Henri Martin, *Histoire de France jusqu'en 1789*, VIII. 181.

<sup>7</sup> Conf. Pierling, *Un arbitrage pontifical au XVI<sup>e</sup> Siècle*, apud *Revue des questions historiques*, t. 37, p. 168.

<sup>8</sup> De Flasseau, I. 133.

<sup>9</sup> Id. II. 197.

<sup>10</sup> Id. I. 197.

<sup>11</sup> Du Mont, *corpus universel diplomatique*, VIII. 1-98; Schmans, *corpus juris publici academici*, No. 101; Kluber et Ott, *Droit des gens moderne de l'Europe*, 82, 456. (The treaty of Ryswick referred to here was the

"Religious sentiment, which had raised to so high a pitch the power of the Pope, naturally augmented, though in a less degree, the influence of the bishops, and we find a number of cases in history in which they were chosen as arbitrators. We may refer to the treaty of Nonancourt, of 1177, which designated three bishops as arbitrators between Louis le Jeune and Henry II. of England, on the subject of Auvergne, Châteauroux, and other fiefs.<sup>1</sup> In 1276, two bishops and a warrior were nominated as judges between the Kings of Hungary and Bohemia. On the 9th of August, 1475, all the grounds of disagreement between Louis XI. and Edward of England were referred to the Archbishop of Paris and the Count of Dunois on the part of France, and to the Archbishop of Canterbury and the Duke of Clarence on the part of England.<sup>2</sup>

"The rivals of the Popes in their struggle for universal supremacy were the Emperors of Germany, who considered themselves the successors of the Roman Caesars.<sup>3</sup> The celebrated conflict between the priesthood and the empire, the spiritual and the temporal power, filled the second half of the Middle Ages; and the two principal episodes were the war concerning investitures and the struggle between the Guelphs and the Ghibellines. The inclination of the Holy Empire to universal domination caused the Emperors to attempt, as the Popes had done, to constitute themselves arbitrators between kings.<sup>4</sup> But in this they did not succeed; and history records only a few instances of arbitration in which they figured as judges.<sup>5</sup> And even when they were accepted as arbitrators, everything was carefully excluded which might have implied their supremacy over other monarchs. Pütter relates that when in 1378 the Emperor Charles IV. went to Paris to decide the old controversy between France and England, they apparently recognized his prerogatives, but they carefully avoided everything which could imply a right of supreme jurisdiction, belonging to him over kings.<sup>6</sup>

"Beside the religious influence of the Popes, we should place, as having contributed during the Middle Ages to the development of arbitration, feudalism, which, while extending itself over all Europe, naturally pre-disposed vassals to accept their lords as judges of their respective grievances. The most eminent of these lords, the kings, were often chosen as arbitrators, chiefly the Kings of France. Saint Louis was constituted judge between Henry III. of England and his barons, in 1263,<sup>7</sup> and between the Counts of Luxemburg and of Bar in 1268. Owing to his great wisdom and to the authority of his character, Louis IX., says M. Lacroix, rivalled

treaty between the Empire and France, Oct. 30, 1697. Art. VIII. submitted the claims of the Dutchess of Orleans, as to certain places restored to the Elector Palatine, to their Imperial and Most Christian Majesties, and, in case they could not agree, to the final decision of the Pope.)

<sup>1</sup> De Flissan, I. 104.

<sup>2</sup> Du Mont, III. 1<sup>re</sup> partie, 500.

<sup>3</sup> Le Dante, Livre de la monarchie.

<sup>4</sup> Dreyfus, 27.

<sup>5</sup> Du Mont, III. 2<sup>e</sup> partie, 144.

<sup>6</sup> Kamarowski, 130, note 2.

<sup>7</sup> De Flissan, I. 124.

the Papacy in the rôle of conciliator and arbitrator.<sup>1</sup> Philip VI.,<sup>2</sup> Charles V., Charles VII.,<sup>3</sup> and Louis XI. were all chosen as arbitrators. The other monarchs of Europe filled the rôle, though not so often, notably the Kings of England, Henry II.<sup>4</sup> and William III.<sup>5</sup> But the commission of arbitration was not generally confided to sovereigns from whom were apprehended attempts at absolute domination, after the manner of the German Emperors, and it was for this reason that Philip II. proposed himself in vain as arbitrator between France and England.<sup>6</sup>

"Occasionally a city assumed the duties of arbitrator, but such occasions were rare. The treaty of Westminster of October 23, 1655, which reestablished friendly relations between France and the republic of England, stipulated, in article 24, probably because of the preference of Cromwell, that the republic of Hamburg should act as arbitrator between the two countries and decide the question of damages on both sides from the year 1640.<sup>7</sup> We may also cite, in 1665, the arbitration of the Grand Council of Malines, between Frederick William, elector of Brandenburg, and the States-General, concerning the obligation of a debt called the debt of Hofyser;" and that of the States-General of the United Provinces, concerning dissensions relating to fortified places and auxiliary points, between France and Spain, after the peace of Nimeguen."

"The parliaments of France, renowned for their wisdom and equity, were chosen to settle disputes between foreign sovereigns.<sup>10</sup>

"Besides popes, kings, cities and great constituted bodies, we may mention commissions of arbitration instituted by parties in proportions fixed in advance and invested with full power over particular subjects.<sup>11</sup>

"Again, some eminent juriconsult was employed specially renowned for his juridical knowledge. The doctors of the Italian universities of Perugia and Padua, and particularly of the celebrated University of Bologna, were, says Wheaton, on account of their fame and their knowledge of law, often employed as diplomatists or arbitrators, to settle conflicts between the different states of Italy.<sup>12</sup> They were employed to determine the question of the right of the house of Farnese to the succes-

<sup>1</sup> P. IX.

<sup>2</sup> Du Mont. I., II<sup>e</sup> partie, 142.

<sup>3</sup> Id. III., 1<sup>re</sup> partie, 144.

<sup>4</sup> Nys, *Le droit et les précurseurs de Grotius*, 32.

<sup>5</sup> Du Mont. VIII. 1<sup>re</sup> partie, 93.

<sup>6</sup> De Flassan, II. 42.

<sup>7</sup> De Flassan, III. 200. (Art. XXV. also provided for the submission in the same manner of a question as to the possession of certain forts in America.)

<sup>8</sup> Du Mont, VI. 3<sup>e</sup> partie, 41.

<sup>9</sup> Du Mont, VIII. 365.

<sup>10</sup> Dalloz, *Répertoire*, v<sup>o</sup> Arbitrage, ch. VI. sec. 16; Chopin, *Traité du domaine*, liv. II. t. XV. sec. 9; Carnazza-Amari, *Traité de droit int. trad. Montanari-Revest*, II. 565, note; Despanges. 702.

<sup>11</sup> Rouard de Card, *L'arbitrage int. dans le passé, le présent et l'avenir*, 18; de Flassan, I. 116, 257.

<sup>12</sup> Les progrès du droit des gens, I. 109; Bry, *Précis de droit int. public*, 462.



sion to the throne of Portugal.<sup>1</sup> One of the most illustrious of them, Alciat, decided upon the rights of sovereignty and of independence of the different principalities of Italy and of Germany.<sup>2</sup> In France, Jean Begat, councillor of the parliament of Dijon, was chosen as arbitrator between the King of Spain and Switzerland, in relation to Franche Comté, in 1570.<sup>3</sup>

"Under the influence of religious and fœdal ideas arbitrations were very frequent in the Middle Ages, which afford the remarkable spectacle of conciliation and peace making their way amid the most warlike populations that have ever existed. They were especially frequent in Italy, where in the thirteenth century there were not less than a hundred between the princes and inhabitants of that country.<sup>4</sup> But when the Papacy had renounced its rule over civil society and absolute monarchies gradually became established in Europe on the ruins of feudalism, arbitrations became more rare. They diminished during the course of the fourteenth and fifteenth centuries, and it is stated that from the end of the sixteenth century till the French Revolution, they had almost disappeared from international usage. Nevertheless, says Klüber,<sup>5</sup> to judge by manifestoes and proclamations, no sovereign ever went to war without having made every effort to prevent it. Why, then, he asks, did they not seek arbitration? Klüber, says Kamarowski, did not answer this question; but the answer may be found in these words of Rousseau: 'Could they submit themselves to a tribunal of men who boasted that their power was founded exclusively on the sword and who bowed down to God only because he is in heaven?'"

"If we should try to find judicial rules that governed arbitration in the different periods at which we have glanced, we should discover that they did not present great stability, and that they varied with different litigations. The choice of arbitrators fell generally on monarchs, and exceptionally on arbitral commissions or private individuals. A period was sometimes fixed either for the meeting of the arbitrators (the treaty of Vervins of 1598, art. 17, provided that it should take place in six months) or for the rendering of the decision (the Treaty of Westminster of 1655 allowed six months and a half). Sometimes a penal clause was inserted, by which a penalty was imposed on the party who refused to submit to the decision; for example, the treaty of the 9th of August 1475, between Louis XI. and Edward IV., prescribed a sum of three million francs.<sup>7</sup>

"The procedure, also, varied according to the case, but it usually afforded certain guarantees and was invested with a certain judicial aspect. In the dispute relating to Montferrat, between the Dukes of Savoy and Mantua and the Marquis of Saluces, Charles V. empowered certain persons to

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<sup>1</sup> Travers Twiss, *Le Droit des gens en temps de guerre*, 10; Carnazza-Amari.

<sup>2</sup> Pradier-Fodéré, 342.

<sup>3</sup> Dalloz, *loc. cit.*

<sup>4</sup> *Digesto italiano*, IV. 1<sup>re</sup> partie, 319 à 374, v<sup>o</sup> Arbitrati internazionali. *Conf. Pandectes françaises*, *loc. cit.*, No. 21.

<sup>5</sup> P. 456, note a.

<sup>6</sup> P. 186.

<sup>7</sup> De Flassean, 226.

examine the matter, and with their advice rendered his judgment. In the presence of these delegates the lawyers of the litigants appeared and argued, either about the whole of Montferrat or some of its territories or special rights. First, the Emperor decided on the principal object of the dispute, and allotted Montferrat to the Duke of Mantua; next he settled the question of the dowery of Blanche of Savoy, for the guaranty of which he set apart certain sureties; and finally he decided concerning the gift of a marriage portion. The restoration of the possession of the Duke of Mantua was made conditional on his furnishing sufficient securities to the Emperor. The parties were ordered to repair to the imperial court, and there to receive the final decision, which settled forever the question between the possessor and the petitioner.<sup>1</sup>

"The arbitral clause, or stipulation for the arbitration of difficulties that may arise, does not appear to have been frequent in the Middle Ages, or in later times, though we have had occasion to cite some examples of it. It seems, however, to have been in use between the commercial cities of Italy. Vattel relates that the Swiss, in the alliances which they contracted, whether among themselves or with foreign peoples, had recourse to it; and he justly praised them for it.<sup>2</sup> We may cite two applications of it in the case of the cities of Italy and the Swiss Cantons. In a treaty of alliance concluded in 1235, between Genoa and Venice, there is an article which reads thus: 'If a difficulty should arise between the aforesaid cities, which cannot easily be settled by themselves, it shall be decided by the arbitration of the Sovereign Pontiff; and if one of the parties violate the treaty, we agree that His Holiness shall excommunicate the offending city.'<sup>3</sup> The treaty signed in 1516, between Francis I. and the Swiss Cantons, which was known by the name of the 'Perpetual Peace,' contains the following clause: 'Difficulties and disputes that may arise between the subjects of the King and the inhabitants of the Swiss Cantons, shall be settled by the judgment of four men of standing, two of whom shall be named by each party; which four arbitrators shall hear, in an appointed place, the parties or their attorneys; and, if they shall be divided in opinion, there shall be chosen from the neighboring countries an unbiassed man of ability, who shall join with the arbitrators in determining the question. If the matter in dispute is between a subject of the Cantons and Leagues and the King of France, the Cantons will examine the demand, and, if it is well founded, they will present it to the King; but, if the King is not satisfied with it, they may call the King before the arbitrators, who shall be selected from among impartial judges of the countries of Coire or of Valois, and whatever shall be decided by the aforesaid judges, by a judicial or amicable sentence, shall be inviolably observed without any revocation.' M. de Flassan says that these stipulations were worthy of remark as examples of good faith and true wisdom. He adds

<sup>1</sup> Barbeyrac, III. 1<sup>re</sup> partie, 118.

<sup>2</sup> Vattel, *Le Droit des gens*, L. II., C. XXVIII., sec. 329, t. II., p. 58. Conf. *Histoire de la Confédération helvétique*, de A. L. de Watteville, L. IV.

<sup>3</sup> A. Portile, *Storia del diritto italiano*, citation des *Pandectes françaises*, No. 24.

that this treaty of perpetual peace was the basis of numerous alliances, which from this date took place between France and the Swiss Cantons.<sup>1</sup>

"Let us finally add that in arbitrations anterior to the 17th century, it is often very difficult, sometimes impossible, clearly to separate cases of mediation from those of arbitration, either because the terminology was not very definite or the expressions used were equivocal, or because the distinction was not clear to the minds of the negotiators. Thus the bishops chosen to settle pending difficulties between Louis XI. and Edward of England were styled *arbitrators* or *amicable mediators*.

"In 1334 Philip of Valois declared himself elected judge, negotiator, and arbitrator between the King of Bohemia, the Princes of Germany, and the Duke of Brabant. Sometimes the mediation was of an obligatory nature, owing to the fear inspired by the mediator's being able to impress his views by force of arms. Thus Henri IV. acted as mediator between the Republic of Venice and Pope Paul V. The Pope counted on Spain's sustaining him; but Henri IV., in order to oppose the forces of that country, made propositions to the Swiss to raise ten thousand men; so that the Pope was finally obliged to submit to the will of the French King.

"But from the year 1595 we find the distinction between mediation and arbitration clearly defined by the French ministers, who interposed between the Protestants and Catholics, who were on the point of coming to blows on the subject of the expulsion of Catholic magistrates from Aix-la-Chapelle and of their replacement by a Protestant magistracy. 'We declare to you,' say the ministers on the part of His Majesty (the King of France), 'that he has no design of prejudicing the authority and the rights of the Emperor, of the Empire, of any prince, or of any person; and in order that the pending dispute may be discussed in an easy and orderly way, we invite you respectively to depute peaceable and dispassionate men, who can confer with us in all confidence and safety, and we will listen patiently to whatever they may say and propose, not as judges or arbitrators, but as mediators and amicable compositors.'"<sup>2</sup>

**Additional cases**—It is proper to refer to certain early arbitrations, or provisions for arbitration, not mentioned in the preceding review. It seems that in 1299 certain commissioners were sitting in Paris "to redress damages done to merchants of various nations by a French admiral within the English seas."<sup>3</sup> This apparently was in the nature of an arbitral proceeding.

"In 1321 a treaty was entered into with John of Brittany for the settlement of piracy claims by arbitrators—"a ce amender civilement." It is provided that the procedure is to be "somerement et de plantz"—"summary and straightforward." The same expression is used to describe the procedure of the admiralty court in admirals' patents of the sixteenth century."<sup>4</sup>

<sup>1</sup> I. 313.

<sup>2</sup> De Flassean, I. 310.

<sup>3</sup> Hall, Int. Law, 4th ed. 147.

<sup>4</sup> Select Pleas in the Court of Admiralty (Selden Society Publications), I. XXIII., citing Fed. II. pt. 1, p. 456.

By Articles VII. to XIII., inclusive, of a treaty between James I. of England and Henry IV. of France, signed at Paris, February 24, 1606, tribunals in the nature of international courts of commerce were created. It being "impossible to provide against particular complaints," even concerning the quality of commodities transported from one kingdom to the other, and to prevent "mistakes and abuses," it was agreed that his Most Christian Majesty should name "two noted French merchants in the city of Rouen, men of substance and experience," who, with two English merchants of like quality to be appointed by the British ambassador in France, should receive the complaints of English merchants and remove all differences as to traffic and commerce in Rouen and the harbors of the province. On the other hand, His Britannic Majesty was to name two merchants in London, who, with two French merchants to be named by the French ambassador, were to receive the complaints of French merchants. And when they could not agree, the four merchants at Rouen were to choose "a fifth French merchant," and the merchants at London an English merchant, so that "the judgments passed by the plurality of voices," should be "followed and put in execution." It was further stipulated that "like establishments" should be made "in the cities of Bordeaux and Caen, as also in the cities and towns of the kingdoms of Great Britain and Ireland." For convenience these merchants were to be called "Conservators of commerce." They were charged, among other things, "to take care of the weights and measures in every city of the one and the other kingdom, that so there may be no fraud or abuse on either side;" and as to "merchandises," they were to "regulate such as they shall judge proper to be inspected and visited." They were specially charged to supervise the trade in cloths, deciding what were "good and fit for the market," and what should be "returned to England as being bad."<sup>1</sup>

The Treaty of Munster (Peace of Westphalia), October 24, 1648, provided (Art. VIII.) that the controversy touching Lorraine should be "referred to arbitrators nominated by both sides," or else terminated by a treaty between France and Spain, or by some other friendly means.

By Articles CVIII.-CX., inclusive, of the Peace of the Pyrenees, of November 7, 1659, it was provided that, in order to give effect to the unexecuted provisions of the Treaty of Vervins of 1598, which was confirmed and approved, commissioners should be appointed on both sides, with power to agree "concerning all things to be yet executed, either touching the interests of the said lords and kings or the interests of the commonalties and private persons, their subjects, who shall have anything to demand or complaint to make on either side," and also "to regulate the limits as well between the dominions and countries that of old have belonged to said lords and kings, about which there have been some debates, as between the dominions and lordships that are to remain to each of them, by the present treaty, in the Low Countries;" and in case they should be unable to agree, it was stipulated that "arbitrators" should be appointed

<sup>1</sup> See, for a somewhat similar provision for a commercial tribunal, Article XXI. of the treaty between Spain and the Low Countries, signed at Munster January 30, 1648.

to take cognizance of "whatsoever shall remain undecided between the said commissioners," and that the "judgments" rendered by the arbitrators should "be executed on both sides without any delay or difficulty."

By Articles CXXII. and CXXIII. of the same treaty, providing for the adhesion of various powers, it was stipulated that if his Catholic Majesty, or his Most Christian Majesty, should, either of them, have "any pretensions" against a power adhering as an ally of the other, he should prosecute such pretensions only "by right, before competent judges, and not by force."

By Article VII. of the treaty between the King of Sweden and Cromwell, Protector of England, signed at London in 1656, it was provided that commissioners should be appointed to decide disputes as to certain claims for satisfaction under the Treaty of Upsal.

In the declaration of war of Charles II. of England against the United Provinces in March 1672, there is this sentence: "The States were particularly engaged by an article of the Treaty at Breda to send commissioners to London about the regulation of our trade in the East Indies. But they went so far from doing it upon that obligation that, when we sent over our ambassador to put them in mind of it, he could not in three years' time get from them any satisfaction in the material points, nor a forbearance of the wrongs which our subjects received in those parts."

By Article VIII. of the treaty between France and Great Britain, concluded at Ryswick September 10-20, 1697, provision was made for the appointment of commissioners "to examine and determine the rights and pretensions" which either contracting party had "to the places situated in Hudson's Bay," as well as certain other matters in dispute.

Articles X. and XI. of the treaty signed by France and Great Britain at Utrecht, March 31-April 11, 1713, each provided for the appointment of commissaries, those under the former article to fix the boundaries between Hudson's Bay and the places appertaining to the French, and those under the latter to adjust claims made by the subjects of each country against the other growing out of various incursions, depredations, and spoliations.

The peace of Ryswick between France and Spain, September 20, 1697, provided (Art. X.) for the submission to arbitration of questions as to the possession of eighty-two towns.

Article XXVI. of the Treaty of Baden of September 27, 1714, between the Emperor of Germany and France, provided for the appointment of commissioners to settle certain disputes.

By the Treaty of Passarowitz of July 21, 1718, between the Emperor of Germany and the Sultan, provision was made for the reference to commissioners of all controversies which might arise "concerning any articles of this armistice, or any other thing." (Art. IX.)

By the same treaty (Art. V.) commissioners were to be chosen to determine the limits of "Dalmatia, Erzegovina, Albania, and the Archipelago." By Article XVI. of the treaty, it was provided that "whenever quarrels and animosities arise on the frontiers by reason of murders or other cause, they shall be decided according to equity by the arbitration of the governors of those borders."

**Great Britain and the Netherlands.**—"A sentence of arbitration,<sup>1</sup> passed between Oliver Cromwell, Protector of England, on one part, and the lords the States-General of the United Provinces of the Netherlands on the other part, in pursuance of the treaty of peace concluded the 5th of April 1654, concerning certain ships and effects of the English that were seized and detained in the dominions of the King of Denmark ever since the 18th of May 1652. Done at London the 31st of July 1654.

"Whereas by the peace lately concluded between his highness the lord Protector on the one part, and the lords the States-General on the other, it is stipulated in the 28th article as follows, viz:

"That whereas the ships and effects of certain Englishmen have been seized and detained in the dominions of the King of Denmark since the 18th day of May 1652, it is stipulated, agreed, and concluded on both sides, and the States-General have obliged themselves, and do oblige themselves by these presents, that all and singular the ships and goods detained as aforesaid, and hitherto remaining in specie, together with the true and just value of those that have been sold, embezzled, or otherwise disposed of, shall be restored within a fortnight after the arrival of the merchants and mariners whom it concerns, or their attorneys empowered to receive them; and the losses also which have accrued to the English aforesaid by the detainer thereof shall be made good according to an appraisement, to be made by Edward Winslow, James Russel, John Bex, and William Vander Cryssen, arbitrators indifferently chosen, as well on the part of His Highness as of the States-General (the form or instrument of whose arbitration is already agreed on), to examine and determine the demands of the merchants, masters, and owners to whom the said ships, effects, and losses appertain. Which said arbitrators shall meet in that called Goldsmith's Hall here in London, on the 27th of June next, O. S., or sooner, if possible, and shall take a solemn oath on the same day, before the judges of the high court of admiralty of England, that they will renounce all manner of respect and relation to either state and the profit of every private person. And moreover, that the arbitrators shall, after the first day of August next ensuing, unless they agree beforehand, be shut up in a room separate from all other persons, without fire, candle, meat, drink, or other support, till they have agreed of the matters aforesaid to them referred. Which sentence or award by them given shall bind and oblige both parties. And the States-General of the United Provinces firmly bind and oblige themselves by these presents to perform the same, and to pay the sum of money which shall be awarded by the said arbitrators here at London, for the use of the said owners, to such person or persons as His Highness shall name, within twenty-five days after the award so given. And the States-General, within two days after the mutual exchange of the instruments for ratifying the articles of the peace, shall pay the sum of five thousand pounds English here at London, towards the expenses to be incurred by the merchants, masters, or owners in their voyage to Denmark, and the sum of 20,000 rix-dollars to such persons as His Highness shall nominate, within six days after those persons shall arrive there, for the use of the merchants, masters, and owners for repairing and fitting

<sup>1</sup>A General Collection of Treaties of Peace and Commerce (London, 1732), III. 112-135.

out their ships for their return. Which said sums shall be in part of payment of the sum which shall be contained in the award of the said arbitrators. And that a bond and security shall be given (the form of which bond is already agreed on) by sufficient men able to answer it, and living here in London, obliging themselves in the sum of 140,000 pounds English money (the original of which bond shall be delivered at the same time with the instrument of the ratification) to make restitution as aforesaid, and to pay as well the 20,000 rix-dollars as the other sums which shall be awarded as aforesaid. And if all or any of the conditions above mentioned are not effectually and really performed in the time and manner prescribed, then the penalty of the said bond shall be demanded, and the said sum of 140,000 pounds English money shall be paid to the person or persons to be nominated by His Highness, and the losses of the merchants, mariners, and owners made good out of it.'

"Which said article His Serene Highness, the above-mentioned Lord Protector, by virtue of his commission dated the 13th of April last at Westminster, under the great seal of the Republic of England, and the fore-mentioned lords the States-General, by virtue of their commission dated the 22d of the said month at The Hague, under their great seal, have ratified and confirmed, and are respectively contented and satisfied, and have agreed to maintain all and every part and clause according to the nature and propriety of contracts established between princes and sovereign powers, and to observe and accomplish the same truly and faithfully in all its branches, without any excuse, exception, or pretext which might be alleged for want of the usual formalities, and without having recourse to those subtleties and punctilios which are required by law, but are hereby renounced on both sides, in order to make this article effectual, according to the true intent and meaning of it.

"Moreover, His Highness, the Lord Protector, on his part, and the Lords the States-General on theirs, have with one accord nominated and appointed, and do by virtue of their foresaid commission nominate and appoint us, Edward Winslow, James Russel, John Bex, and William van der Cruysen, their arbitrators, commissioners, and judges, fully authorized (which we accept) to hear, examine, and by all ways and means possible to determine and pronounce the award concerning all and every grievance and pretension of all and singular the merchants, gentlemen, and others, on account of any ships, rigging, apparel, provisions, goods, and merchandize, and all things else under any denomination whatsoever belonging to any subject of England, Scotland, and Ireland, or the dominions thereof, which have been seized, detained, or sequestered in any of the dominions of the King of Denmark since the 18th of May 1652, whereof mention has been made in memorials sealed up and delivered by the merchants in March 1653 and in the year 1654.

"Next, in pursuance of the said commissions granted to us by his said Serene Highness and the Lords the States-General, we are to assemble on the 27th of June next, O. S., in Goldsmiths' Hall aforesaid, and take our solemn oaths, all and every one of us in particular, to hear, examine, and determine what is before mentioned, or any matters thereto belonging which may have a reference to either of the two nations, in pursuance of the power given us by the said commissions, without partiality, favor, and affection on either side, and also to renounce all private views and inter-

ests which might hinder us from finding the truth and from coming to a summary conclusion; to proceed impartially to compare jointly the interests and damages of all and every claimant: To which purpose the judges of the High Court of Admiralty, by virtue of a commission granted to them by the Lord Protector, are authorized and appointed to administer the said oath to us on the 27th of June, in Goldsmiths' Hall, after the administration of which oath we are fully impowered to inquire into and examine all the heads of grievances and pretensions which shall appear to be represented by the subjects of the Republic of England, Scotland, and Ireland, on account of any vessel whatsoever and of all sorts of merchandize, goods, or anything which happened to be detained in the manner aforesaid. Therefore, as we shall jointly and severally judge and find what might be produced in exception by the contrary party on oath, or without oath, by instruments, documents, or other proofs, for any abatement or payment, we shall be capable to examine and find out the truth of all and every one of the said grievances and claims, the real value of the said ships, rigging, and everything to them belonging, the freight, provisions, merchandizes, goods, &c., as also all and every damage occasioned by the loss which the said ships and freight sustained by reason of the detainer. We are, moreover, authorized and impowered to proceed to a liquidation and taxation of all such damages sustained, and to give an impartial estimate and to pronounce judgment, and to publish the same under our hands as we shall think meet and just; which sentence, after it has been pronounced and published, shall not be subject on either side to any farther revision, appeal, or reclamation.

"Accordingly, the said Lords the States-General, by virtue of their commission, bound and obliged themselves to conform effectually to our said sentence, and to pay such sum of money as should be demonstrated by us to be an equivalent for the said loss within twenty-five days after our said final sentence was declared and published. In like manner we, the commissioners, are fully impowered and desired to assemble at Goldsmiths' Hall aforesaid for the purpose above mentioned, and after our first meeting, which was to be on the 27th of June, not to omit any day, except the Lord's day (commonly called Sunday), in order to proceed in the affair aforesaid, but especially not to defer the matters recommended to us, but to carry them to a final resolution and certain judgment, or else to break off abruptly. It was furthermore concluded between the commissioners on the part of the Lord Protector and those of the States-General that in case we should not agree to come to a final judgment and declaration in the matters herein expressed before the first of August next ensuing, we should be locked up in a room at Goldsmiths' Hall, without fire, candle, victuals or drink, or any sustenance, from the said first of August till such time as we should agree to pronounce sentence upon the aforesaid matters, and to publish the same under our hands and seals; which confinement shall not render our award less binding than if the sentence had been given before it, in order to confirm all those intentions, constructions, and meanings which the said commissioners might form more at large.

"In conformity to what is above, be it known by these presents, that we, the aforesaid Edward Winslow, James Russel, John Bex, and William van der Cruysen, out of an humble obedience to the said article, and to



the commissions therein contained, by virtue of the authority, full power, and direction given to us, assembled in Goldsmiths' Hall and took our solemn oath before the commissioners of the High Court of Admiralty of England, in such form and manner as it expressed and directed in the said article to be done by us the said commissioners, and that thereupon we have received, heard, and examined all and singular the grievances and claims of all and every the merchants, gentlemen, masters of ships, owners, and all such persons, subjects of the republic of England, Scotland, and Ireland, as are concerned in the said ships, rigging, provisions, merchandize, goods, and other things assigned and belonging to them, which have been seized and detained in the lands and dominions of the King of Denmark since the 18th of May 1652, and whereof mention was made in the memorials and writings delivered by the merchants concerned, in March 1653 and 1654, and exhibited to us, of ships and all sorts of merchandize, goods, or any other thing seized and detained as aforesaid, and also of all those things which were in general or particular produced on the other side, either by way of defense, or in abatement and payment of the said grievances and claims, together with the proofs of all and singular the said grievances and claims, as likewise of the right and true value of all such ships, rigging, appurtenances, freight, provisions, merchandize, goods, and damages occasioned as well by the said seizure and detainer as by the loss and detriment of the said goods and merchandize, or by any other means, by oath, and by such instruments, documents, and other proofs as we found, and judged necessary and equitable. We examined, and after mature deliberation of everything before us, compared one thing with another, cleared up and taxed, and at length determined and particularly declared and pronounced all and singular the damages aforesaid. Accordingly we, the before-named Edward Winslow, James Russel, John Bex, and William van der Cruysen, by virtue of the authority, full power, and direction given to us in and by the aforesaid article and commissions, and for accomplishing what is thereby understood, do, by these presents, under our hand and seal, determine, decide, and finally pronounce, that the damages so often mentioned amount to 97,973 pounds and ten pence, lawful money of England, as we do hereby liquidate and tax the damages just now mentioned to be 97,973 pounds and ten pence, lawful English money: And we do moreover decide and pronounce that the said Lords and States-General shall pay, or cause to be paid, the said sum of 97,973 pounds and ten pence, lawful English money, in London, for the use of the respective owners, to such person or persons as His Highness the Lord Protector shall appoint, within twenty-five days after this our award.

"In witness whereof we, the aforementioned Edward Winslow, James Russel, John Bex, and William van der Cruysen, have to the purpose aforesaid hereunto set our hands and seals, in Goldsmiths' Hall aforesaid, the 31st of July, according to the usual calculation, anno 1654.

*"Indorse.*

"N. B.—That we the said commissioners mentioned in this instrument do find that the sum of 5,000*l.* sterling and 20,000 rix-dollars, amounting together to the sum of 10,000*l.* sterling, is paid, which, according to the tenor of the twenty-eighth article of the treaty of peace, is to be reckoned in

part of payment of the sum by us declared as within mentioned. In witness whereof we have set our hands the day and year within specified."

"A regulation made and passed the 30th of August 1654 by the commissioners nominated on both sides, concerning the losses and damages sustained, as well on the part of the English East and West India companies and others, as on the part of the East and West India companies of the United Provinces, etc., pursuant to the treaty of peace between England and the United Provinces, in the year 1654.<sup>1</sup>

"We, John Exton, William Turner, William Thompson, Thomas Kendal, Adrian van Aelmonde, Christian van Rodenburgh, Lewis Houwen, and James Oysel, to all who shall see these presents and to all whom the underwritten do or may concern, greeting: Whereas by the 30th article of the treaty lately concluded and entered into between the most high lord protector of the Republic of England, Scotland, and Ireland, and the Dominions thereof, etc., and the high and mighty lords, the states-general of the United Netherlands, it was stipulated 'That four commissioners shall be named on both sides at the time of exchanging the ratifications, to meet here at London on the 18th of May next, according to the English style, who, at the same time, shall be instructed and authorized, as they are authorized and instructed by these presents, to examine and distinguish all those losses and injuries in the year 1611, and after to the 18th of May 1652, according to the English style, as well in the East Indies, as in Greenland, Muscovy, Brazil, or whatever else either party complains of having suffered them from the other. And the particulars of all those injuries and damages shall be exhibited to the said commissioners so nominated, before the aforesaid 18th day of May, with this restriction, that no new ones shall be admitted after that day.'

"And the most high lord protector above-mentioned and the most high and mighty the states-general of the United Netherlands agreed on both sides afterwards that the meeting of said commissioners should be deferred to the 30th day of May; and being mutually desirous that the things premised in the said article might have their due effect, did nominate and appoint us aforesaid their commissioners, for the examination and determination of the premises, with full, entire, absolute, and irrevocable powers, viz: The aforesaid lord protector, for his part, appointed the aforesaid John Exton, William Turner, William Thompson, and Thomas Kendal; and the aforesaid lords the states-general, in like manner, on their part, nominated Adrian van Aelmonde, Christian van Rodenburgh, Lewis Houwen, and James Oysel. And whereas the said lord protector, and the lords the states-general aforesaid, gave and granted to us the aforesaid John Exton, William Turner, William Thompson, Thomas Kendal, Adrian van Aelmonde, Christian van Rodenburgh, Lewis Houwen, and James Oysel, full and entire power and authority to examine and determine all those injuries which either part complains of having received from the other, from the year 1611 to the 18th day of May 1652, as well in the East Indies as in Greenland, Muscovy, Brazil, or any other country. And whereas it was their pleasure, that we, the aforesaid commissioners, should be fully and wholly impowered to hear and examine

<sup>1</sup> Jenkinson, Treaties, etc., I. 52-68.

all instructions and informations of and concerning the premises, and all and either of them, and to admit of all documents and instruments of proof whatsoever, as also persons and witnesses, both *viva voce* and otherwise, as it shall be thought good, and in general freely to do and dispatch all and every thing and things which shall be necessary in or about the premises, according to solid discretion, for the better discovery of the truth, summarily, plainly, and without the noise and form of judgment. And whereas they gave and granted to us, the commissioners so chosen, full, entire, and absolute government and arbitration, power and authority to discuss, decide, and adjudge all and singular injuries and losses whatsoever, and (all appeal and revision whatsoever being entirely removed and set aside) as should seem to us the above-said commissioners consistent with equity and reason, finally to determine, liquidate, declare, and estimate the losses on both sides, and order, decree, and award real reparation, restitution, and payment to be made for the respective losses so liquidated and estimated, at convenient and reasonable times and places, and to proceed in the whole business aforesaid, fully, entirely, and finally, according to absolute arbitration, within the space of three months, to be computed successively from the 30th of May, in such manner that whatsoever we the commissioners aforesaid should determine, within the three months aforesaid, should fully and absolutely bind both parties; and both the lord protector for his part and that of the English, and the lords the states-general of the United Netherlands for their own part and that of the people of the United Provinces, were to take care that they caused all and singular the things which should be ordered and awarded by us the said commissioners within the said three months, in all and every one of the premises, to be observed, as is to be seen more at large from the very instruments of the commission. We, therefore, John Exton, William Turner, William Thompson, Thomas Kendal, Adrain van Aelmonde, (Christian van Rodenburgh, Lewis Houwen, and James Oysel, meeting here at London, on the 30th of May, by virtue of the commission granted to us, did receive, within the term prefixed, the complaints of injuries and losses which the English society exercising commerce in the East Indies alleged and complained they have received from the East India Company of the United Netherlands, and which, *vice versa*, the said India Company of the Netherlands complained of having received from the said English company exercising traffick in the Indies, as we have here caused them to be inserted *verbatim*.

“A complaint, or certain schedule of losses which the merchants of the English company trading to the East Indies have sustained in the said Indies and the South Sea from the merchants of the Dutch company trading in the Indies aforesaid, for which reparation is required on the part of the aforesaid merchants of the English company before the lords commissioners of both nations.

“First, we desire reparation of the particular losses included in the fifteen articles following, which are calculated at £48,900 15s. sterling.

“1. On the 20th of March 1621. That the Dutch merchants at the Molucca Islands, Amboina, and Banda, in the very first year that we were partners of the expense with them in that trade, put down the following costs to the account, after the rate of one-third of our trade, *viz.* The expenses

laid out on the ships *Galihorne* and *Tingans*, on the schools, lodgings, gifts, and other extraordinary matters (to which we are by no means obliged to contribute). And while we advanced our quota, after the rate of one-third, towards the pay of the soldiers in ready money, they paid them in clothing of an unreasonable price; upon which accounts we paid that year 40,000 reals of eight, over and above our third share of the general expenses.

“II. March 21, 1621. That on the part of the English 24,650 reals have been paid for their third share in the building and repair of castles at the Molucca Islands, Banda, and Amboina, in which places we were but one year in possession of the trade, whereas the said repairs would hold good for several years, so that at least three-fourths of the said reals, amounting to 18,488 reals of eight, ought to be refunded.

“III. March 20, 1621. That the Dutch merchants exacted 1,106 reals of eight and compelled the English in the Molucca Islands and Amboina to pay the same, quite contrary to the treaties and conventions, under pretence of paying custom for cloves.

“IV. March 20, 1622. We paid at the Molucca Islands and Amboina 36,965 reals of eight to the said Dutch merchants, to be reckoned towards the expenses of the spices of the second year, expecting to be sharers with them in the trade of those islands; but the injuries and robberies committed upon us daily by the Dutch made us at first anxious and solicitous about the aforesaid trade; and at length the *inhuman cruelties* with which they treated our nation, first at Poloron, and then at Amboina, *wholly drove us out of the said trade*; wherefore we desire restitution of the aforesaid reals, for which we have not yet obtained satisfaction.

“V. The said English company in the said first year laid out 23,507 reals of eight in domestic expenses, general charges, rents of houses, gifts, and cost of merchandize in the Molucca Islands, Banda, and Amboina; two-thirds of which are to be refunded by the Dutch company, amounting to 15,671 reals of eight.

“VI. August 26, 1622. By the devastation and depopulation of the island of Poloron, the English lost in debts, for which Oran Kayenses and other natives were bound, to the value of 5,725 reals of eight.

“VII. The Dutch took and carried away by violence 21 slaves from the castle of Neilac, situate in the isle of Poloron, who were lawfully in the possession of the English, and are valued at 2,100 reals of eight.

“VIII. They also detained from us one-third part of four hundred slaves and other goods, taken in lawful war by those very ships for which they had settled a price beforehand, and forced us to pay it. Now, the third part of the said slaves, according to their own appraisement, comes to 9,975 reals, which, with the third part of the aforesaid vessels, valued at 1,000 reals, amounts to 10,975 reals of eight.

“IX. In September, 1622. That the Dutch fiscal took away by force certain goods out of the English warehouses at Jacatra, to the value of 16,182 reals of eight, in execution of an unjust sentence given on the part of certain Chinese, notwithstanding the appeal made by our consul to Enrope, according to the form of the convention.

“X. February 22, 1622. At the same time when they committed that *inhuman massacre* of our countrymen at Amboina, they took away 30,058 reals of eight from the English.

“‘XI. February 20, 1622. That they expelled the English from their dwelling houses, warehouses, and other edifices in the Molucca Islands and Banda, in the building of which they had laid out 4,266 reals.

“‘XII. That they had compelled the English in Jacatra to pay customs and other taxes contrary to treaties to the value of 4,777 reals of eight.

“‘XIII. About the beginning of April 1627 the Dutch fiscal took away by force a sum of money to the value of 7,242 reals out of the warehouses of the English at Jacatra, in Japan, in execution of an unjust sentence on the part of John Mary Moret, an Italian.

“‘XIV. That they compelled our commissary, or agent, Richard Weldeu, to pay 50 reals at Banda for setting one Danckes at liberty, whom they had almost starved to death in prison.

“‘XV. Moreover, the governor having spent 200 barrels of powder in the discharges he caused to be made of the guns by way of ostentation at certain entertainments, they compelled our said agent to pay one-third of the expense, at the rate of 30 reals for each barrel, which amounts in the whole to 2,000 reals.

“‘Secondly. We demand satisfaction for the fruits of the island Poleron, which used to produce annually 228,000 lb. weight of nutmegs, and about 60,000 lb. weight of mace, of which the one-third due to the English (reckoning every pound of nutmegs at 12d. and every pound of mace at 2s.) brought in 5,966l. 13s. 4d. a year, which, if repeated for eighteen years, viz, to the year 1639, according to agreement, amounts to 107,380l. sterling.

“‘Thirdly. We demand satisfaction for all the fruits whatsoever of the said island Poleron, for the last fifteen years elapsed, since the year 1639, when they were to come to the English alone, to this present year 1654; which fruits, supposing the produce to be in proportion as aforesaid, viz, of 228,000 lb. weight of nutmegs and 60,000 lb. of mace, yield 17,900 pounds a year, and for the fifteen years 268,500 pounds.

“‘Fourthly. We demand that the island Poleron, which manifestly and rightfully belongs to the English, both by consent and by stipulations made in the convention in the year 1619, may be restored to us, and restored up to us and delivered up to us in the same state as when it was when we were expelled from it.

“‘Fifthly. We demand satisfaction for the fruits of the island of Loutor, which, as will manifestly appear by the depositions of the several witnesses, has produced 500,000 lb. weight of nutmegs and 200,000 lb. weight of mace *per annum*, the third part of which coming to the English (reckoning a pound of nutmegs at 12d. and a pound of mace at 2s. as aforesaid) yields 15,000l. a year, and 270,000l. for eighteen years.

“‘Sixthly. We demand satisfaction for all the fruits whatsoever of the said island of Loutor, appertaining to the English alone, and gathered for fifteen years last past; which, according to the rates of the nutmegs and mace above-mentioned, bring in 15,000l. a year, and from the year 1639 to 1654, amount to 675,000l.

“‘Seventhly. We demand restitution of the island Loutor above-mentioned, belonging solely to the English, who were actually and rightfully possessed of it in the year 1620, at the very time when the articles of confederacy and peace were first concluded in those parts of the Indies, and who, it is no less true, were afterwards forcibly expelled from that possession by the Dutch.

“‘Eighthly. According to the articles of the convention, we demand satisfaction for the thirds of all the Spice Islands whatsoever, which have been possessed by the Dutch from the year 1621 to 1639, viz, within these eighteen years; the thirds of which islands, after reckoning the expenses, we compute worth 25,000*l.* a year, so that our share in eighteen years’ time amounts to 450,000*l.*

“‘Ninthly. We demand satisfaction for all the merchandize and provisions partly taken from us and partly by us delivered to the commissioners of the Dutch company trading in the Indies or to any of their ships whatsoever, going out or returning, to the value of 12,000 reals of eight, or 3,000*l.* sterling.

“‘Tenthly. We demand satisfaction for one moiety of the customs of Persia due to us since the year 1624 for the Dutch merchandize by virtue of a treaty betwixt us and the King of Persia, which moiety over and above the yearly value of 4,000*l.* we are sure has been spent, and which for thirty years to the present year, viz, 1654, makes 120,000*l.*

“‘Eleventhly. We demand reparation of the loss of our dwelling houses, warehouses, merchandize, and provisions which were fraudulently and wickedly consumed by fire at Jacatra in the year 1628, the Dutch governor in that place giving the occasion, as has been proved by solemn protestations. The aforesaid losses are computed at 200,000 reals of eight, which amount to 50,000*l.* sterling.

“‘Twelfthly. We demand reparation of the losses which we sustained from the Dutch since they denied us free passage to Bantam. From which time for six years we have been altogether hindered from that trade, and consequently from laying out 600,000 reals of eight in the purchase of pepper according to our proportion; which pepper, if it had been bought, would have served to load our ships for another market, while for want of cargoes of merchandize they lay in the Indies without any motion, and were worm-eaten; during which our money and provisions were spent in the seamen’s wages and daily allowances; so that the losses aforesaid can not be reckoned at less than 2 millions of reals, or 600,000*l.* sterling.

“‘Thirteenthly. We demand that 102,959 reals of eight may be refunded to us, being the sum of money taken from our countrymen at Surat by the subjects of Mogul, who were so protected by the Dutch that we were not able to make reprisals upon their persons or goods, either in galleys or ships; which nevertheless might have easily been attempted and done, had not the Dutch, *with the greatest injury to us*, given shelter to those pirates; and which sum of money, if it had not been taken from us as aforesaid, had long ago produced us in Europe one-third profit; wherefore we compute those losses at 77,200*l.* sterling.

“‘Fourteenthly. We demand the restitution of a quantity of pepper taken by the Dutch in the year 1649, out of the ship called *Endymion Pandongha*, near Sumatra. The loss we have sustained on that account is computed at 6,000*l.*

“‘Fifteenthly. We demand satisfaction for the losses we have sustained since the year 1649 in the price of pepper, which we have been compelled to buy at a greater rate in other places than that commodity used to be sold for on the coasts of Sumatra; which trade the Dutch have by violence

hindered our ships from carrying on in those parts. This loss arising from thence is calculated at 20,000*l.* sterling.

“The total sum of the aforesaid demand, exclusive of the islands of Poloron and Lontor, amounts to two millions six hundred and ninety-five thousand nine hundred and ninety-nine pounds fifteen shillings sterling.

“And the interest thereof, if computed to this time, will amount to a far greater sum.

“Moreover, since the English often touch at the Cape of Good Hope with their ships, and, as in the reign of James, late King of Great Britain, they took solemn possession of those lands, and caused a rampart to be cast up, called James's Mount, on which they planted the English colors, we demand that the inheritance of those territories may always remain in the power of the English, and that it may be free for them, not only to carry colonies thither, to raise fortifications there, and to lay in provisions, but to trade from thence to any other parts whatsoever, as well the Indies, as in the South Sea and Eastern parts, with the same liberty as they were ever enjoyed since that trade began, and use and enjoy the same privileges in all places of those parts, as are used and enjoyed by the United Netherlands.

“The aforesaid merchants of the English company trading to the Indies, demand satisfaction for four ships illegally taken in the Gulf of Persia, about the month of February 1652; which, although it was a fact committed without the time limited by the articles stipulated concerning restitution, yet we humbly conceive, that because the said ships were taken by private persons without any authority or pretense of a commission intervening, we ought therefore to have satisfaction, according to the loss, which amounts to 100,000*l.* sterling.’

“The demand of the Dutch East India Company, who affirm it to be a just claim, of the monies which they expect as satisfaction from the English Company.

“I. First, for the expenses to which the Dutch company contributed over and above their quota, by reason of a deficiency on the part of the English during seventeen years (on the expiration of the treaty which was made between both companies in 1619), which amounts for the proportion of the English to 510,000*l.* English money.

“II. For one-half of the expense paid for the English in the defense of Fort Gueldres, in Paleacate, after they had omitted to contribute any more, from the year 1622 to the year 1639 (the treaty of 1619 then expiring), the said moiety whereof, paid for the English, makes at least 21,350*l.* English money.

“III. The sum of 26,339*l.* 3*s.* 6*d.* English money is demanded for half of the charges which the Dutch company paid for the English company at the siege of Bantam, after the month of August 1621, when they had left off paying their quota, till the month of October 1627. To all which we might add the spoiling of ships, sails, anchors, cables, and gunpowder, lead, firearms, and other necessaries for war, wore out and wasted within that term in the business of both companies, by the ships and their boats, besides the loss which the Dutch company suffered in their trade, because they were obliged to detain their ships at such sieges, and for

that reason to omit several profitable expeditions, all which things, if duly inspected, would amount to a great sum of money, not to reckon the repair and purchase of the boats commonly called tingans and of other small vessels, from the first of September 1622 (when the last account was cast up) to the first of September 1627, being five years, and reckoning for each year at least 500*l.* English money.

“IV. For half of the value of the ship *Hert*, of 250 tons burthen, which was lost in the joint expedition to Mozambique in pursuing and overtaking the enemy, valued, according to the appraisement of the chamber on the part of the English, at 1,022*l.* English money.

“V. For third part of the sums laid out in the *Moluccas*, *Amboina*, and *Banda*, after February 1622, from which time the English left off paying their quota in those parts, till the expiration of the treaty in the year 1639, being seventeen years, each requiring the contribution of 30,000*l.* English money, or thereabouts, for the third part of the English, which sums computed will amount to 510,000*l.* English money.

“VI. For the loss which the Dutch company suffered by the seizing and destroying of three of their ships in the harbor of Portsmouth which were bound with their lading from Surat, which loss is computed, at least, at 100,000*l.* English money.

“VII. For the half share of the loss which accrued from the want of the pepper trade to *Bantam* during the space of six years, in which they compute their loss to have been as great as the English, have reckoned theirs to be in their demand, viz, 600,000*l.* English money.

“VIII. For the extraordinary and continual heavy charges which the Dutch India Company has borne in the annual equipment of ships and convoys for the safety of the merchantmen in their return from the Indies by the North Sea, which expenses have not been less than 10,000*l.* English *per annum*, and for the term of twenty years must be computed at the sum of 200,000*l.* English.

“IX. And, moreover, for three months' wages which the ships' companies that returned with those merchantmen from the Indies by the North Sea received, besides their ordinary pay, as a premium by reason of the difficult sailing in those seas, and which is continued to this very day, and amounts to no less than 5,000*l.* English *per annum*, and for the term of twenty years to 100,000*l.* English.

“IX. For provisions and other necessities for voyages, which the Dutch India Company's agents lent to the English India Company in their passage to and from India and during their stay there; of all which they are ready to give in an account.

“X. For the pay and sustenance of the soldiers brought by the Dutch company out of the Netherlands, for supplying the garrisons in the *Moluccas*, *Amboina*, and *Banda*, and carried back from thence to the Netherlands, towards which the English company by order of the chambers should have contributed one-third; of all which an exacter account may be given.

“The wages of the crews of the pinnaces called *Pera*, *Arnheim*, and *Surat*, and the other charges; as also the damages of those ships, and the price of the ship named *Correcorre*, together with the costs of a certain pink called *Haeg*, which were employed in the service of the joint trade near *Amboina*, are to be put down to the account of the year 1621, which the English ought to have paid, as well as other expenses; concerning which



proper intimation has been given to the English company's agents in India; all which particulars are capable of being more exactly calculated.

“These several sums added together and cast up make in the total two millions sixty-nine thousand eight hundred sixty-one pounds three shillings and six pence English sterling, besides use and interest, and many other things that deserve a more ample deduction, for which the Dutch company demand just restitution, real and full satisfaction, not reckoning the great losses and delays which they have suffered for no other reason but the deficiency of the English in not duly observing the before-mentioned article, and the hinderance of trade by the settlements which the English have cunningly gained all over the East Indies; all which particulars are more fully calculated and expressed in the complaints of the Dutch company delivered by their deputies to the English company on the 20th of June 1629. Over and above these things, the Dutch company with regard to those pretensions for which no particular sum is demanded, and which have not been varied by time, requires just restitution and satisfaction. All the things reckoned as above are brought no lower down than to the expiration of the treaty of the year 1629, viz, to the month of July in 1639; although the English company extends several of its pretensions in their demand to the years 1651 and 1652—far beyond the expiration and limits of the said treaty.

“And because the English India Company, in several articles of their demands so delivered, blame the Dutch India Company for cruelly treating their agents, and thereby giving occasion to the English to desert their habitations in the aforesaid places belonging to the Dutch company, the said Dutch company has been pleased, for the removing of these foul slanders with which it is causelessly traduced, to put the English in mind of what follows, viz: That their agents having (for reasons best known to themselves) petitioned the governor-general of Batavia for their dismissal, first, on the 16th day of January 1623; again, on the 28th of the said month; and the third and last time on the 9th of December 1624 did on the 11th of the said December 1624 set sail with nine ships and pinnaces, together with all their mariners and merchandize, from Batavia to the Straits of Sunda, and fortified themselves in the island of Lagondum, where, living miserably for six months, and 400 of their companions being dead by reason of the unwholesomeness of the situation, they were reduced to such extremity that they were obliged to represent their distressed condition to the governor-general of the Dutch company, begging his favor, both by ambassadors and epistles, that they might be delivered from that pestilential spot, as they said, and might be allowed to go with their surviving companions to Batavia, as is manifest from two several epistles of theirs sent to the governor-general of the Dutch company. To which the governor returned answer that, having considered their requests (as sincere friends ought to do by one another), he would not deny them speedy assistance, which was performed by the sending of a pinnace thither first, called *Abigail*, and then a ship named the *Good Fortune*, with many men, provisions, and other necessities; and a promise was added that they should be welcome to return to Batavia to the habitations they had there before. Upon this the pinnace sailed with forty sick men to Batavia for their recovery, and carried back sixty healthy, stout men; and a little after she was followed by the said ship *Good Fortune* and a

small pink called *Palalecata*, which were both stationed about Bantam, that they might be near to carry relief to those at Lagondum, which was done out of hand; and as soon as one of them arrived at Batavia with six other English ships and pinnaces and the surviving of the ships' companies, who were for the most part sick, they were cheerfully enough received, and carried to their former settlement, to which a famous new structure was added, and they were furnished with other necessaries. Of the aforesaid sick men three soon died, and the factors of the Dutch company, to the number of almost fourscore, were infected also with the same distemper, which to many proved mortal; and, as the English themselves own, they were reduced to such a miserable state in Lagondum that, had it not been for the assistance aforesaid, it was the opinion of many they would all have perished; for which reason the president himself and the other governors did oftenly loudly declare that the assistance given to them was so great and unexpected that they should never forget it as long as they lived, but always remember it; and that not only their private letters would be witnesses of it, but a catalogue of the particulars would be inserted in the public monuments of England.

“For which assistance, and for the charges which the Dutch company has been liable to on this account, the said Dutch company does not doubt but they shall receive just satisfaction and recompense from the English company.

“And moreover, when the deputies of the Dutch company came to the examination of the matter in question, they pleaded that the *third* article of their pretensions (which treats to the expenses incurred at the siege at Bantam) stated only in part, without expressing the sum of the expences in general, which sum they did then express and assert that it rose to 850,000*l.* sterling, and they have desired that their demand may be augmented with the said sum.’

“All which complaints and demands, exhibited to us, the said commissioners, by the deputies of both the English and Dutch companies, expressly chose to this purpose, have been laid before us, with a great number of documents, instruments, and proofs exhibited, as well for forming and corroborating their own demands, as for destroying and refuting those of the opposite party; and at length the arbitration of all these controversies is submitted to us the aforesaid commissioners by the said deputies of both companies.

“Wherefore, we, the aforesaid John Exton, William Turner, William Thompson, Thomas Kendal, Adrian van Aelmonde, Christian van Rodenberg, Lewis Houwens, and James Oyfel, after having seen, read, examined, and accurately considered all the documents, instruments, and proofs exhibited to us on both sides, together with all other things which seemed necessary for the discovery of the truth, and being desirous to reconcile and to establish a perpetual agreement between both the companies aforesaid, by virtue of the power and authority to us given and granted by the most high the Lord Protector of the republic of *England, Scotland, and Ireland*, and the high and mighty lords the states general of the *United Netherlands*, have decided, defined, and determined, and by this our present award and arbitration do decide, define, and determine as follows: We make void, extinguish, obliterate, and altogether wipe out and commit to oblivion (so as never to be revived at any time, and upon any pretence, by any

person whatsoever) all complaints, pretensions, and controversies mentioned more at large above, and all others whatsoever which the English company trading in the East Indies doth or may form against the Dutch company, without excepting any, of whatsoever kind, nature, or condition they may be; and particularly we appoint and ordain that the said English company shall not for the future sue or demand anything of the said Dutch company in Persia or elsewhere, under the denomination of the customs of Ormuz and Gamron; so that the Dutch shall never be molested or disturbed by the English for this cause under any pretext. Provided, nevertheless, that this does not prejudice any action or plaint which the English company may entertain against the King of Persia or any other person whatsoever, the Dutch excepted.

"In like manner we make void, extinguish, obliterate, and wholly blot out and commit to oblivion (so as never to be revived at any time, and upon any pretence, by any person whatsoever) all complaints, pretensions, and controversies mentioned above more at large, and all others, whatsoever they may be, which the aforesaid Dutch East India Company doth or may form against the before-named English company trading in the East Indies, excepting none, of whatsoever kind, nature, or condition they may be.

"And moreover we appoint and decree that the said Dutch company shall yield and restore the island Poleron to the said English company, in the same state and condition as it is now. Provided, nevertheless, that it shall be lawful for the said Dutch company to take away and remove out of the said island all military furniture, merchandize, household stuff, and all moveables, if they happen to have any in the said island.

"And in the last place we decree and ordain that the said Dutch company shall pay the said English company 85,000*l.* sterling, to be paid here at London, one moiety before the last day of January next ensuing, according to the English style, and the other moiety before the last day of March following, according to the same style.

"And all controversies between both the said companies being by this means composed, decided, and determined, to the end that a stop may also be put to the quarrels of private persons, we have seen, pursued, and examined all the complaints and demands exhibited to us in due time, in the name of some private Englishmen who complained of having received injury and damage at Amboina in the year 1623; and on the other hand, we have heard and considered the matters which have been alleged and exhibited by the above-mentioned deputies of the Dutch company in their own defense; and we, the commissioners aforesaid, considering that no one person, besides those underwritten, has on this account entered any actions or demands before us within the due time, after which it is not lawful to enter any more; and being therefore desirous that no reliicks of complaint should remain and that all cause of wrangling may be removed, after having duly considered and weighed all things, do by virtue of the full power and authority given and granted to us by the most high lord protector, and the high and mighty States of the United Netherlands, appoint and ordain that all complaint, action, and demand of the English whatsoever, whether public or private, on the score of any injury or damage which they pretend to have suffered at Amboina in the year 1622, the English style, and in 1623, N. S., may be made void, terminated, and com-

mitted to oblivion; and that no person, whosoever he be, shall enter any action on that account, or molest, disturb, or vex the said Dutch company, or any Dutchman on that pretext. And on the other hand, we also decree and ordain that the said Dutch company shall pay here in London, before the first day of January next ensuing, 700*l.* sterling to William Towerson, nephew and administrator of the effects of Gabriel Towerson, late of Amboina, deceased; to William Coulson, brother of Samuel Coulson, &c., administrator in like manner of his effects, 450*l.*; to James Bayles, administrator of John Powell, 350*l.*; to Anthony Ellingham, administrator of the effects of William Grigg, 200*l.*; to the administrators of the effects of John Weteral, 200*l.*; to Jane Webber, administratrix of the effects of George Seharoch, 150*l.*; to John and Elizabeth Collins, the children and heirs of Edward Collins, 465*l.*; to the administrators of John Beaumont, 300*l.*; to Jane Webber, widow and administratrix of the effects of William Webber, 200*l.*; to James Baile, administrator of the effects of Ephraim Ramsey, 350*l.*; to the executors of the will of Thomas Radbrosee, 50*l.*; and to Thomas Billinsby, administrator of the effects of Emanuel Thompson, 200*l.*

"All which sums added together make the sum of 3,615*l.* sterling, to be paid here at London before January next ensuing, and on this condition we insist that their actions or suits be altogether set aside and cancelled so as never to be revived hereafter by any person whomsoever.

"In witness whereof, we, John Exton, William Turner, William Thompson, Thomas Kendal, Adrian van Aelmonde, Christian van Rodenburg, Lewis Houwens, and James Oysel have subscribed these presents and sealed them with our seals the 30th of August, the English style, in the year 1654.

"This sentence or award was signed and sealed in manner as follows:

"JOHN EXTON.	[L. S.]
"WILLIAM TURNER.	[L. S.]
"WILLIAM THOMPSON.	[L. S.]
"THOMAS KENDAL.	[L. S.]
"ADRIAN VAN AELMONDE.	[L. S.]
"CHRISTIAN VAN RODENBURG.	[L. S.]
"LEWIS HOUWENS.	[L. S.]
"JAMES OYSEL."	[L. S.]

"Convention between Oliver Cromwell, Protector of England, and the high and mighty States General of the United Netherlands, for constituting a congress at Amsterdam of commissioners, to be nominated on both sides, for determining all the remaining complaints, without limitation, in the award and arbitration passed the 30th August 1654, upon their controversies.

"Whereas, by the 30th article of the late treaty between the most serene lord protector of the republic of England, Scotland, and Ireland and the high and mighty lords the States General of the United Netherlands, it was agreed that the commissioners or arbitrators should be nominated and appointed, with full and absolute power and authority to examine and determine all those losses and injuries which the one party laid to the charge of the other from the year 1611 to the 18th of May 1652, O. S., and which each party ought to have exhibited before the 18th of May 1654, which said day, nevertheless, by consent of both parties, was put off till

the 30th of the said month; and if the said commissioners did not agree concerning the said losses and injuries within three months after that day, the said complaints should be referred to the Protestant Cantons of Switzerland, who should be desired to nominate and appoint commissioners for examining and determining the aforesaid complaints within six months after the expiration of the former three;

"And whereas the commissioners of both republics assembled at London, and received sundry complaints to them delivered within the time aforesaid, and examined and determined some, as expressed in the award and arbitration of the aforesaid commissioners, published under their hands and seals the 30th day of August, 1654 O. S.;

"And whereas several yet remain undetermined, which, according to the 30th article aforesaid, ought to have been referred to the above-mentioned protestant Canton, of Switzerland, in order for decision by certain commissioners to be by them nominated and appointed; which nomination and appointment was not made by them within the term of six months aforesaid, and yet it is necessary that the said complaints should be decided, and all private grudges removed, and that every shadow of discord may be for the future taken away:

"It is therefore agreed and concluded between the most serene lord protector and the high and mighty lords of the States General, that all complaints exhibited within the time aforesaid, viz, the 30th of May 1654, and not included and determined in the above-mentioned award and arbitration, shall be referred and submitted to the judgment and determination of the aforesaid commissioners, who published the said award and arbitration, or of others who shall be nominated and constituted on both sides; and that they shall meet again at Amsterdam, in Holland, furnished and invested with the same full power and authority as before; and that they shall proceed in the same order and manner, and with the same method, and consequently determine all the complaints aforesaid within three months after their first congress, which shall be on the 26th of July 1655. And that public notice thereof shall be given to the people of both republics, and that all things which the aforesaid commissioners shall determine within the three months aforesaid shall bind both parties. In witness of all and singular the premises, both we, the commissioner of his highness, and I, the ambassador extraordinary of the united provinces of the Netherlands, have signed these presents with our hands and sealed them with our seals. Done at Westminster May 9, (O. S., anno 1655."

**The Netherlands and Portugal.**—The Dutch and the Portuguese concluded August 6, 1661, through the mediation of England, a treaty of peace and alliance.<sup>1</sup> Disputes, however, arose as to its ratification, and it was not till July 30, 1669, after the Dutch had made considerable conquests in the Portuguese colonies, that a definitive peace was signed at The Hague.<sup>2</sup> Among the questions raised in regard to the treaty of 1661, there was one relating to the payment by Portugal to the Netherlands of the sum of 4,000,000 cruzados, for which the salt of Setuval was pledged. This question having formed the subject of an unyielding disagreement, it was

<sup>1</sup> Dyer, *Modern Europe*, III. 68; Dumont, *Corps Diplomatique*, VI. 366.

<sup>2</sup> Dumont, VII. 114.

referred in 1669 to the arbitration of Sir William Temple, then British ambassador at The Hague, by whom an award was duly rendered.<sup>1</sup>

The sentence of Sir William Temple recites certain conferences with the ambassador of Portugal and the pensionary De Witt, in regard to the manner of paying 2,500,000 cruzados, due from Portugal to Holland, for which the salt of Setúval was pledged. The Portuguese ambassador proposed that the payment should be made by assigning all rights to the salt for the term of seventeen or eighteen years. De Witt proposed an assignment for a term of twenty-two or twenty-three years. Difficulties also existed as to the manner of paying the interest. Sir William Temple proposed that Portugal should assign to Holland all rights as to the salt for the space of twenty years in satisfaction of the entire debt, unless the debt should be discharged sooner. The Portuguese ambassador took time to consider this proposition. The pensionary accepted it on condition that, if the salt rights should not yield in any year the sum of 150,000 cruzados, Portugal should supply the deficiency in the following year, and that Portugal should not raise the price of the salt for Hollanders nor lower it for others. The Portuguese ambassador accepted the proposal of Sir William Temple, and also the condition in regard to raising or lowering the price of the salt, but rejected the other condition proposed by the pensionary. After further conferences with Sir William Temple, the Portuguese ambassador and the pensionary, being unable to agree, decided to submit the matter to the decision of Sir William as arbitrator, provided that the Portuguese ambassador consented that the value of the salt should be regulated entirely by cruzados.

"In virtue of this convention," so reads the sentence, "the said English ambassador, having maturely considered all that has been recited, as well as the interest of the two nations and that of their neighbors and allies, that this long contested matter should be amicably terminated so as to remove any ground of future dispute, declares and adjudges that the first plan proposed by the said ambassador, touching the period of twenty years, having been already accepted by the two parties, shall remain firm and valid, with these conditions, that Holland shall be obliged to extract from Setúval in all the years during said term as much salt as she has taken away in any of the ten years lately passed, but that, in case the salt rights in Setúval shall not amount to 150,000 cruzados in any year of the said term of twenty years, Portugal shall supply what has fallen short of the said sum in the following year, provided the said deficit does not exceed the value of 30,000 cruzados.

"The said English ambassador also adjudges it to be equitable that

<sup>1</sup> Works of Sir William Temple, II. 59. The title of the arbitral sentence is, "Sentence donnée sur l'affaire du Portugal et de la Hollande, par l'ambassadeur de l'Angleterre, à qui les deux parties ont remis la décision finale de leurs différences, non pas comme ambassadeur d'Angleterre, mais comme Chevalier Temple." The date of the sentence is given in the works as "August 1669." It seems, however, to have been rendered in July, as the substance of it is embodied in the treaty of July 30, 1669. Courtenay, *Memoirs of Sir William Temple*, I. 373, refers to this sentence as evidence of the high estimation in which Sir William Temple was held.

Holland shall not claim any other satisfaction for the debt besides the salt rights of Setuval for the said term of twenty years.

"That the value of the salt shall be computed in cruzados, without regard to any other money, since no mention is made in the treaty of any other kind.

"And in case Portugal shall offer to discharge part of the debt by other means, Holland shall reduce the said term in proportion."

## 2. ARBITRATIONS OF THE NINETEENTH CENTURY.

**International commissions in relation to rivers.**—We have heretofore referred to certain treaties between the United States and Mexico in relation to the Rio Grande where it forms the boundary between the two countries.<sup>1</sup> These treaties refer, however, to boundary questions, rather than to questions of navigation; but by a series of European treaties provisions have been made for the regulation of the navigation of international streams by means of mixed commissions.

The "navigation of the Rhine, from the point where it becomes navigable unto the sea, and vice versa," was, by the Peace of Paris of May 30, 1814, declared to be "free, so that it can be interdicted to no one;" and it was provided that at the congress to be held at Vienna "attention" should "be paid to the establishment of the principles according to which the duties to be raised by the states bordering on the Rhine may be regulated, in the mode most impartial and the most favorable to the commerce of all nations." And it was further stipulated that "the future congress, with a view to facilitate communication between nations, and continually to render them less strangers to each other," should "likewise examine and determine in what manner the above provisions can be extended to other rivers which in their navigable course separate or traverse different states."

By the Treaty of Vienna of June 9, 1815, the powers whose states were "separated or traversed by the same navigable river" engaged "to regulate, by common consent, all that regards its navigation," and for this purpose to name commissioners who should adopt as the bases of their proceedings certain principles, the chief of which was that the navigation of such rivers, "along their whole course, \* \* \* from the point where each of them becomes navigable to its mouth shall be entirely free, and shall not, in respect to commerce, be prohibited to any one," subject to regulations of police. In order to assure the application of this principle, articles were inserted expressly regulating in certain respects the free navigation of the Rhine; and it was provided that "the same freedom of navigation" should "be extended to the Necker, the Mayne, the Moselle, the Meuse, and the Scheldt, from the point where each of them becomes navigable to their mouths." And in order to "establish a perfect control" over the regulation of the navigation, and to "constitute an authority which may serve as a means of communication between the states of the Rhine upon all subjects relating to navigation," it was stipulated that a central commission should be appointed, consisting of delegates named by

<sup>1</sup> *Supra*, II. 1359.

the various bordering states, which commission should regularly assemble at Mayence on the 1st of November in each year. Regulations for the navigation of the Moselle and the Meuse were to be drawn up by those members of the central commission whose governments should have possessions on the banks of those rivers.<sup>1</sup>

By the treaty between Austria and Russia of May 3, 1815, the navigation of the rivers and canals of the ancient kingdom of Poland was declared to be free "so as not to be interdicted to any inhabitant of the Polish provinces, subject to either the Russian or Austrian Government." It was agreed, however, that a tonnage duty should be levied for the purpose of maintaining the rivers and canals in question in a navigable state, and that commissioners should be appointed for the purpose of regulating this and other matters of navigation. Similar provisions were embodied in a treaty concluded on the same day between Prussia and Russia touching ancient Poland.

By the treaty between Prussia and Saxony of May 18, 1815, provision was made (Art. XVII.) for the creation of a commission to regulate the navigation of the Elbe, in accordance with the general principles adopted at the Congress of Vienna. By the treaty of June 23, 1821, between Austria, Denmark, Great Britain, Prussia, Saxony, Hanover, Mecklenburg-Schwerin, Anhalt-Bernburg, Coethen and Dessau, and Hamburg, "the navigation of the Elbe, from the point at which that river becomes navigable down to the open sea, and *vice versa* (as well in ascending as in descending)," was declared to be "entirely free with respect to commerce." To secure this end various stipulations were made, including a provision for the appointment of a commission of revision, whose members should be appointed by the bordering States, and whose object and powers should be "to watch over the due observance of the present convention; to form itself into a committee for the settlement of any differences which may arise between the States bordering on the river, and to determine upon the measures which by experience may be found to be necessary to the improvement of commerce and navigation."

A treaty between Austria, Modena, and Parma, of July 3, 1849, to which the Pope acceded February 12, 1850, declared the navigation of the Po to be free and open to all persons, and committed its regulation to a commission.<sup>2</sup>

By a treaty signed at Bucharest, December 3-15, 1866, between Austria, Russia, and the United Principalities of Moldavia and Wallachia, the navigation of the Pruth was declared to be free and open to all flags; and

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<sup>1</sup> Among the stipulations embodied in the treaty there was one to the effect that in the event of war breaking out among any of the states of the Rhine the collection of customs should "continue uninterrupted, without any obstacle being thrown in the way by either party," and that "vessels and persons employed by the custom-houses" should "enjoy all the rights of neutrality."

<sup>2</sup> The Treaty of Vienna, June 9, 1815, Art. XCVI. provided that the general principles adopted by the Congress in regard to the navigation of rivers should apply to the Po, and that commissioners should be appointed by the States bordering on it to regulate all that concerned its navigation.



provision was made for a permanent mixed commission for the purpose of regulating such navigation.

The river Douro, by a treaty between Portugal and Spain of August 31, 1835, was declared to be free for the navigation of "the subjects of both Crowns." It was provided that navigation dues and the police of the river should be regulated by a mixed commission.

By Article V. of the Treaty of Teschen, May 13, 1779, the rivers Danube, Inn, and Salza were declared to be common to the House of Austria and the Elector Palatine for the navigation of their subjects. These stipulations were confirmed as to the Salza and Saale by the treaty between Austria and Bavaria of April 14, 1816.

By Article XV. of the Peace of Paris of March 30, 1856, it was provided that the principles established by the Congress of Vienna for the regulation of the navigation of rivers which separate or traverse different States should in future apply to the Danube and its mouths, whose navigation was declared to be free, subject to police and quarantine regulations. With a view to carry out this arrangement it was stipulated (Art. XVI.) that a European commission, composed of one delegate each from Austria, France, Great Britain, Prussia, Russia, Sardinia, and Turkey, should be charged with the execution of works for clearing the mouths of the river and the adjacent seas from obstructions. By Article XVII. of the treaty, provision was made for the establishment of a permanent body, called the Danube River Commission, to be composed of delegates of Austria, Bavaria, Turkey, Wurtemberg, and the three Danubian principalities, for the purpose (1) of preparing regulations of navigation and river police, (2) of removing impediments to the application of the arrangements of the treaty of Vienna, (3) of causing necessary works to be executed along the whole course of the river, and (4) of keeping the mouths and adjacent seas in a navigable state after the dissolution of the European commission.

By the Treaty of London of March 13, 1871, the existence of the European commission was extended to April 24, 1883. It was further provided that "the conditions of the reassembling of the riverain commission," established by Article XVII. of the Treaty of Paris, should "be fixed by a previous understanding between the riverain powers, without prejudice to the clause relative to the three Danubian principalities," and that, so far as any modification of the article should be involved, it should "form the subject of a special convention between the cosignatory powers."

By the Treaty of Berlin of July 13, 1878, in order to increase the guarantees of the free navigation of the Danube, it was provided (Art. LII.) that "all the fortresses and fortifications existing on the course of the river from the Iron Gates to its mouth" should "be razed and no new ones erected." It was also provided (Art. LIII.) that the European commission, on which Roumania was to have a representative, should be "maintained in its functions," and that it should thenceforth exercise them "as far as Galatz in complete independence of the territorial authorities." And it was further provided (Art. LIV.) that prior to the expiration of the term assigned for the duration of the European commission, the powers should "come to an understanding as to the prolongation of its powers, or the modifications which they may consider necessary to introduce," and (Art. LV.) that the regulations respecting the navigation, river police, and

supervision from the Iron Gates to Galatz should be drawn up by the European commission, assisted by delegates of the riverain States, and placed in harmony with those issued for the river below Galatz.

In order to come to an understanding in regard to these last stipulations, a new treaty was concluded March 10, 1883, between Austria-Hungary, France, Germany, Great Britain, Italy, Russia, and Turkey. By this treaty the jurisdiction of the European commission was extended from Galatz to Ibralla, and its powers were prolonged till April 24, 1904, and thereafter for successive terms of three years till a certain notice was given.

But, besides prolonging the existence of the European commission, the treaty also created a new commission, called the "Mixed Commission of the Danube," to consist of delegates of Austria-Hungary, Bulgaria, Roumania, and Servia, and a member of the European commission, for the purpose of superintending the execution of the regulations made for the navigation of the river. This commission is to endure as long as the European commission, to hold two sessions a year, and to make its decisions "by a majority of votes."<sup>1</sup>

**Argentine Republic and Chile.**—For many years there has existed between these countries a difference as to their common boundaries.<sup>2</sup> In 1881, through the mediation of Messrs. Thomas O. Osborn and Thomas A. Osborn respectively, envoys of the United States at Buenos Ayres and Santiago, a treaty was made for its adjustment;<sup>3</sup> but this treaty proved not to be final. In the first place, the Argentine Government claimed that the commissioners appointed to run the boundary under the treaty made an evident mistake in placing the landmark of San Francisco. Secondly, the two governments differed as to the principle on which the line from 26° 52' 45" south latitude to the Straits of Magellan should be determined, whether it should, as the Chileans contended, follow the watershed, or, as the Argentines maintained, pass through the highest peaks of the Andes. Lastly, questions arose as to the line between 23° and 26° 52' 45" south latitude, in the region known as the Puna de Atacama, which was occupied by the Chileans during the war with Bolivia, but which, as the Argentines claimed, had previously been admitted by Bolivia to belong to the Argentine Republic.

By a protocol signed at Santiago, April 17, 1896, provision was made for ending these disputes. As to Puna de Atacama, it was stipulated that the boundary should be traced with the cooperation of Bolivia. The landmark of San Francisco, as placed by the commissioners, was to be disregarded. As to the long line from 26° 52' 45" south latitude to the Straits of Magellan, it was agreed that any differences that could not be adjusted

<sup>1</sup> Boundary commissions have been included in this work only where they partook of the nature of boards of arbitration. The survey of international boundaries is always committed sooner or later to joint commissions, but as a rule the functions of these commissions are judicial only in a limited sense.

<sup>2</sup> For. Rel. 1873, I. 39.

<sup>3</sup> Article V. provided: "The Straits of Magellan are neutralized, and free navigation thereon insured to the flags of all nations. With a view to guaranteeing this freedom and neutrality, no fortifications nor military defenses will be raised that may clash with that object."

by friendly negotiation should be settled by the arbitration of the British Government.<sup>1</sup>

Austria and other powers: Right of property in the Duchy of Bouillon.<sup>2</sup>—By Article LXIX. of the final act of the Congress of Vienna, June 9, 1815, it was provided that the sovereignty of that part of the Duchy of Bouillon which was not ceded to France by the Treaty of Paris should be vested in the King of the Netherlands. The question of property in that part of the duchy was, however, left open, to be determined by arbitration; and it was stipulated that for this purpose five arbitrators should be chosen, one each by the two competitors, and one each by Austria, Prussia, and Russia. These arbitrators were to meet as soon as circumstances would permit, and to decide the question finally and without appeal. Meanwhile, the King of the Netherlands was to hold the property in trust, in order that he might restore it, together with the revenues of the provisional administration, to the competitor in whose favor the arbitrators should decide. The King of the Netherlands was to make to such competitor an equitable indemnification for the cession of his rights of sovereignty. July 1, 1816, the arbitrators rendered the following award:<sup>3</sup>

"In execution of Article 69 of the final act of the Congress of Vienna of June 9, 1815, the commission of arbitrators which met at Leipzig in the beginning of June 1816, to decide the question of the right of succession in the Duchy of Bouillon, has ended, July 1, 1816, its deliberations.

"The possession of the Duchy and the indemnities for the cession of the rights of sovereignty to the King of the Netherlands are adjudged, by an absolute majority, to His Highness Prince Charles-Alain of Rohan-Montbazon, actual duke of Bouillon. Baron de Binder, minister of Austria; Count de Casteloelfer, minister of His Majesty the King of Sardinia at the court of Prussia; and Comte de Fitte de Soucy, named as arbitrators by the Prince de Rohan, have voted in a manner pure and simple, according to the rights of birth and of family, in favor of the claims of the Prince de Rohan, grandson of the sister of the Duke of Bouillon, who died in 1792. The English juriconsult, Sir John Sewell, the arbitrator named by the Vice Admiral Philip of Auvergne, the second claimant, declares himself purely and simply in favor of the claims of the vice admiral. Baron von Brockhausen, minister of state of Prussia, recognizes the right of the Prince de Rohan, but under the condition that the latter shall pay to the adoptive son of his great-uncle Admiral of Auvergne a portion equal to six years' revenue of the Duchy.

"In consequence, the question submitted by the Congress of Vienna as to the right of succession to the Duchy is decided by a majority of four

<sup>1</sup> Mr. Strobel to Mr. Olney, May 9, 1896, For. Rel. 1896, 32.

<sup>2</sup> This is apparently the second arbitration, or provision for arbitration, in regard to the Duchy of Bouillon. Article XXVIII. of the Treaty of Nimeguen of February 3, 1678, reads: "Whereas there hath been an antient difference concerning the Castle and the Dutchy of Bovillon, between the Bishop and the Prince of Liege, and the Dukes of that name, it is hereby agreed, That the Duke of Bovillon continuing in the possession he hath of it, the said difference shall amicably, or by arbiters to be named by the Partys within three months after the ratification of the peace, be composed, without proceeding to acts of force."

<sup>3</sup> This version is from the French text in De Clercq, III. 41.

voices to one, and the clause proposed by one voice alone is rejected by a majority of three to two.

"Done at Leipzig, July 1, 1816.

"LE BARON DE BINDER.

"LE BARON DE BROCKHAUSEN.

"LE COMTE DE CASTELORLIER.

"LE CHEVALIER JOHN SEWELL.

"LE COMTE DE FITTE DE SOUCY."

**Austria and other powers: Cantons of Tessin and Uri.**—By Article VI. of the declaration of March 20, 1815, on the affairs of the Helvetic Confederacy, embodied as Article LXXXI. in the final act of the Congress of Vienna, the cantons of Argovia, Vaud, Tessin, and St. Gall were required to furnish to the cantons of Schweitz, Unterwald, Uri, Glaris, Zug, and Appenzell a certain sum of money to be applied to purposes of public instruction and to a less extent to the expenses of general administration; and for this purpose it was provided that the cantons of Argovia, Vaud, and St. Gall should furnish a certain sum, and that the canton of Tessin should "pay every year to the canton of Uri a moiety of the produce of the tolls in the Levantine Valley." The execution of these arrangements was to be superintended by "a commission appointed by the Diet." It seems that a decision was rendered August 15, 1816, as to the payment by Tessin to Uri.<sup>1</sup>

**Austria-Hungary and Chile.**—See Germany and Chile.

**Chile and Belgium.**—See Chile and Italy.

**Chile and Italy.**—By a protocol signed December 7, 1882, it was agreed that the claims of Italian subjects against Chile, growing out of the war of the latter country with Peru and Bolivia, should be submitted to a tribunal of arbitration. By a protocol signed at Santiago October 2, 1886, the time originally fixed for the sessions of the tribunal was extended, for the reason, as the protocol recited, that the Italian arbitrator had been compelled by private business to return to Italy. The departure of the third arbitrator, Senhor Lafayette Rodriguez Pereira, of Brazil, necessitated a further extension of time, which was agreed upon January 5, 1887. By a protocol concluded January 11, 1888, all claims then undecided by the tribunal, to the number of 261, were settled for 297,000 Chilean silver dollars. It was declared, however, that this arrangement was not to be understood as affecting, directly or indirectly, the principles and jurisprudence maintained by the Chilean Government and sustained by the tribunal. No award was made by the tribunal for the destruction of property either at Miraflores or Chorillos, during or just after the battles at those places. The total amount of the claims submitted to the tribunal was 7,576,030.24 silver soles. The amount awarded on claims decided by it was \$70,326.31, as principal, and \$21,942.36 as interest.<sup>2</sup>

By a convention of August 30, 1884, it was provided that three claims of Belgian subjects should be referred to the commission under the protocol between Chile and Italy.<sup>3</sup>

<sup>1</sup> Calvo, *Le Droit Int.*, 4th ed., —.

<sup>2</sup> For. Rel. 1888, I. 186-188, 190. See *Sentencias pronunciados por el Tribunal Italo-Chileno, 1884-1888*; De Martens, *Recueil*, 2<sup>e</sup> série, X. 638; Calvo, 4th ed. III. 455, 466; *Annuaire de l'Institut*, 1885, 202.

<sup>3</sup> De Martens, *Recueil*, 2<sup>e</sup> série, X. 638.

Chile and Sweden and Norway.—See Great Britain and Chile.

Chile and Switzerland.—By a convention concluded January 19, 1886, ratified by Switzerland July 10, 1886, and by Chile October 7, 1886, the two governments agreed to refer to an arbitral tribunal established in conformity with the German-Chilean convention of August 23, 1884, all claims of Swiss citizens against the Chilean Government growing out of the acts and operations of the latter's land and naval forces on the territory and coasts of Peru and Bolivia during the then recent war of Chile with Peru and Bolivia. It was agreed that the claims should be decided upon the same principles and with the same formalities and conditions as the claims of German subjects under the convention of August 23, 1884.<sup>1</sup>

China and Japan.—A controversy arose between these powers in 1875 in consequence of the killing of a Japanese subject by the Chinese in the island of Formosa. The dispute had reached an acute stage, when it was decided to refer it to Sir Thomas Wade, British minister at Peking, who in due time rendered an award directing the payment of a sum of money by China as reparation for the outrage.<sup>2</sup>

Colombia and Costa Rica.—By a convention signed at San José December 25, 1880, these powers agreed to submit the dispute as to their common boundary to the King of the Belgians, or, if he should decline, to the King of Spain, or, if he too should refuse to act, to the President of the Argentine Republic.<sup>3</sup> The King of the Belgians declined the post of arbitrator,<sup>4</sup> and for a time the matter remained in suspense. An additional treaty on the subject was concluded at Paris January 20, 1886,<sup>5</sup> and the office of arbitrator was accepted by the Queen Regent of Spain on behalf of His Majesty Alfonso XIII.<sup>6</sup> The arbitration lapsed, however, owing to a dispute between the contracting parties as to the time within which their cases were to be presented. Negotiations were afterward undertaken for a new treaty of arbitration.<sup>7</sup> The United States tendered its good offices with a view to facilitate such a conclusion.<sup>8</sup> A report has appeared in the press to the effect that the office of arbitrator in the matter has been accepted by President Faure.<sup>9</sup>

Colombia, Ecuador, and Peru.—Mr. Strobel, then minister of the United States at Quito, reported in a dispatch of December 18, 1894, that "after the rejection by the Congress of Ecuador of the Garcia-Herrera treaty for the settlement of the boundary question with Peru," negotiations were reopened at Lima; that Colombia insisted upon taking part in the conference, and her claim was allowed; that Bolivia made a like attempt, but was unsuccessful. December 17, 1894, the President of Ecuador was informed that a treaty between the three powers had been signed for the submission of their conflicting territorial claims to arbitration; that Spain was to act as arbitrator; and that the decision was to be made not

<sup>1</sup> De Martens, Recueil, 2<sup>e</sup> série, XIV. 324.

<sup>2</sup> See Calvo, Le Droit Int. 4th ed. III. 437.

<sup>3</sup> For. Rel. 1881, 711, 870, 1057.

<sup>4</sup> Id. 71.

<sup>5</sup> Id. 1893, 273-275.

<sup>6</sup> Id. 202.

<sup>7</sup> Id. 266.

<sup>8</sup> Id. 202, 270; 1894, 180, 185.

<sup>9</sup> New York Herald, June 18, 1897.

only upon legal grounds but also with due consideration for the natural claims of the contestants.<sup>1</sup>

**Colombia and Venezuela.**—Award of the King of Spain, as arbitrator, March 16, 1891, on the question of limits between the Republic of Colombia and the United States of Venezuela.

Don Alfonso XIII. por la gracia de Dios y la Constitución Rey de España, y en su nombre y durante su menor edad Doña María Cristina, Reina Regente del Reino:

Por cuanto: hallándose sometida á Mi Gobierno la cuestión de límites pendiente entre la República de Colombia y los Estados Unidos de Venezuela, en virtud y al tenor de lo dispuesto en el Tratado de Caracas de 14 de setiembre de 1881 y del Acta-declaración de París de 15 de febrero de 1886.

Inspirada en los deseos de corresponder á la confianza que por igual han otorgado á la antigua Madre Patria las dos citadas Repúblicas, sometiendo á su decisión asunto de tanta importancia, y que en ocasiones ha comprometido los fraternales vínculos que las unen:

Resultando que al efecto y por Real decreto de 19 de noviembre de 1883 se nombró una Comisión técnica encargada de estudiar detenidamente el litigio y proponer las conclusiones que estimara procedentes:

Resultando que las Altas Partes interesadas presentaron á su debido tiempo los alegatos en apoyo de sus respectivos derechos, y la Comisión, en cumplimiento de las instrucciones que le fueron comunicadas, procedió al detenido exámen de dichos alegatos y de los documentos que obran en los Archivos nacionales y extranjeros referentes á este asunto:

Resultando que por Convenio de las Altas Partes interesadas, el lando ha de fijar los límites que separaban el año de 1810 la antigua Capitanía general de Venezuela, hoy Estados Unidos del mismo nombre, del Virreinato de Santa Fé, hoy República de Colombia:

Resultando que las atribuciones de derecho concedidas al árbitro por el Tratado de Caracas de 14 de setiembre de 1881 fueron ampliadas por el Acta-declaración de París de 15 de febrero de 1886, para poder fijar la línea de frontera "del modo que crea más aproximado á los documentos existentes, cuando respecto de algun punto de ella no arrojen toda la claridad apetecida:"

Resultando que los territorios en litigio forman una ancha zona, que partiendo más al norte de los 12º de latitud en la Península de Goagira, llega poco más de un grado distante del Ecuador á la Piedra del Cocuy, y puede para los efectos de la demarcación considerarse dividida en seis secciones, á saber: 1ª, La Goagira; 2ª, línea de las Sierras de Perijá y de Motilones; 3ª, San Faustino; 4ª, línea de la Serranía de Tomás; 5ª, línea del Sarare, Arauca y Meta, y, 6ª, línea del Orinoco y río Negro:

Considerando que en lo referente á las secciones 1ª y 3ª, la Real Cédula de 8 de setiembre de 1777, la Real orden de 13 de agosto de 1790 y las Actas de entrega y demarcación de Sinamaica en 1792, por lo que respecta á la Goagira, y la Real Cédula de 13 de junio de 1786, la Real orden de 29

<sup>1</sup> For. Rel. 1895, I. 250. Mr. Strobel observes that this "would seem to imply that the final judgment should concede to each country an outlet to the Atlantic by the Amazon and its tributaries."

de julio de 1796 y ley general 1ª, título 1º, libro V, de la Recopilación de Indias, en lo relativo á San Faustino, fijan de una manera clara y precisa los límites que ha de determinar el árbitro, ateniéndose á las facultades *juris* que le asignó el Tratado de Caracas de 1881:

Considerando que en lo referente á las secciones 2ª y 4ª las Altas Partes interesadas han decidido de común acuerdo la frontera en litigio, y es por lo tanto innecesaria la intervención del árbitro:

Considerando que la Real Cédula de creación de la Comandancia de Barinas de 15 de febrero de 1786, que ha de servir de base legal para la determinación de la línea de frontera de la quinta sección, suscita dudas por citarse lugares desconocidos al presente, á saber: *las Barrancas del Sarare* y el *Paso Real de los Casanares*:

Considerando que por esta razón el árbitro se encuentra en uno de los casos previstos en el Acta-declaración de París de 1886, según la cual ha de fijar la línea de frontera del modo que estime más aproximado á los documentos existentes:

Considerando que si bien como queda dicho, se ignora el emplazamiento preciso de las Barrancas del Sarare, por deducciones, y principalmente por lo que en su alegato exponen los Estados Unidos de Venezuela, pueden fijarse para los efectos del laudo en la "comunicación del Sarare con el Arauca:"

Considerando que el curso del río Arauca traza un límite natural, pero que es preciso desviarse de él en un punto del mismo para ir á buscar el Antiguo Apostadero en el río Meta, por expresa indicación de la mencionada Real Cédula de 1786:

Considerando que procede fijar el punto de esta desviación en aquél que por estar próximamente á cuatro jornadas de la ciudad de Barinas y de las referidas Barrancas, como requiere de un modo expreso la mencionada Real Cédula de 1786, debe suponerse, con fundamento, que es el lugar donde en otros tiempos estuvo situado el *Paso Real de los Casanares*:

Considerando que el punto que reúne la expresada condición es el del río Arauca, que se halla equidistante de la villa del mismo nombre y de aquél en que el meridiano de la confluencia del Masparro y del Apure intersecta también el mismo río Arauca:

Considerando que para mayor claridad puede subdividirse la sesión 6ª en dos trozos, á saber: del Meta á Maipures y de Maipures á la Piedra del Cocuy:

Considerando que respecto al primero de los trozos citados, la Real Cédula de nombramiento de D. Carlos Sucre y Pardo, Gobernador de Cumaná; la carta oficio del mismo de 30 de abril de 1735; la Representación á S. M. de D. Gregorio Espinosa de los Monteros, Gobernador también de dicha provincia, de fecha 30 de setiembre de 1743; los mapas, estados de población y correspondencia oficial del Comandante de las Nuevas Poblaciones, D. Manuel Centurión; el informe del P. Manuel Román, Superior de las misiones de Jesuitas del Orinoco, de fecha 3 de diciembre de 1749; el señalamiento del territorio de la Tenencia de la Guayana en 1761 por D. José Diguja y Villagómez, Gobernador asimismo de Cumaná; la carta oficio de éste de 10 de julio de 1761; el proyecto de informe sobre demarcación de la Guayana en 1760 por D. Eugenio Alvarado, segundo Comisario de la expedición de Iturriaga; el informe de D. José Solano, Gobernador de Caracas, de 11 de mayo de 1762; los mapas ó planos geo-

gráficos del Virreinato de Santa Fé por D. José Antonio Perelló, D. Luis Surville, D. Antonio de la Torre, y el de D. Francisco Requena del año 1796, y los modernos de Codazzi y Ponce de León, y por último, el expediente instruido con motivo del viaje que D. Antonio de la Torre hizo en los años de 1782 á 1783 de orden y por comisión del Ilmo. Arzobispo Virrey de Santa Fé, fijan de una manera clara la línea de frontera dentro de las facultades *juris*:

Considerando que el punto de partida y la base legal para la determinación de la línea de frontera en el segundo trozo de la sexta sección es la Real Cédula de 5 de mayo de 1768, sobre cuyo sentido hay disparidad de pareceres entre las dos Altas Partes interesadas:

Considerando que los términos de la mencionada Real Cédula no son tan claros ni precisos como requiere esta clase de documentos para poder fundar exclusivamente en ellos una decisión *juris*:

Considerando, por tanto, que el árbitro está en el caso previsto en el Acta-declaración de París, ya citada:

Considerando que los Estados Unidos de Venezuela poseen de buena fe territorios al occidente del Orinoco, Casiquiare y río Negro, ríos que forman los límites asignados por este lado en la mencionada Real Cédula de 1768 á la provincia de la Guayana:

Considerando que en dichos territorios existen cuantiosos intereses venezolanos, fomentados en la leal creencia de hallarse establecidos en los dominios de los Estados Unidos de Venezuela:

Y considerando, por último, que los ríos Atabapo y Negro trazan una frontera natural, clara y precisa con la sola interrupción de algunos kilómetros de Yárita á Pimichín, respetándose así los términos respectivos de estos dos pueblos:

De acuerdo con mi Consejo de Ministros, y oído el parecer del Consejo de Estado en pleno;

Vengo en declarar que la línea de frontera en litigio entre la República de Colombia y los Estados Unidos de Venezuela queda determinada en la forma siguiente:

*Sección 1ª.* Desde los Mogotes llamados los Frailes, tomando por punto de partida el más inmediato á Juyachi en derechura á la línea que divide el valle de Upar de la provincia de Maracaibo y río de la Hacha, por el lado de arriba de los montes de Oca, debiendo servir de precisos linderos los términos de los referidos montes, por el lado del valle de Upar y el Mogote de Juyachi, por el lado de la Serranía y orillas de la mar.

*Sección 2ª.* Desde la línea que separa el valle de Upar de la provincia de Maracaibo y río de la Hacha, por las cumbres de las Sierras de Perijá y de Motilones, hasta el nacimiento de río Oro, y desde este punto á la boca del Grita en el Zulia; por el trayecto del *statu quo* que atraviesa los ríos Catatumbo, Sardinata y Tarra.

*Sección 3ª.* Desde la embocadura del río de la Grita en el Zulia, por la curva reconocida actualmente como fronteriza hasta la quebrada de Don Pedro, y por ésta bajando hasta el río Táchira.

*Sección 4ª.* Desde la quebrada de Don Pedro, en el río Táchira, aguas arriba de este río hasta su origen, y de aquí por la Serranía y Páramo de Tamá hasta el curso del río Oirá.

*Sección 5ª.* Por el curso del río Oirá hasta su confluencia con el Sarare por las aguas de éste, atravesando por mitad la laguna del Desparramadero



hasta el lugar en que entran en el río Arauca, aguas abajo de éste hasta el punto equidistante de la villa de Arauca y de aquel en que el meridiano de la confluencia del Masparro y del Apure intersecta también el río Arauca, desde este punto en línea recta al Apostadero del Meta, y por las aguas de este río hasta su desembocadura en el Orinoco.

*Sección 6ª, Trozo 1º.* Desde la desembocadura del río Meta en el Orinoco, por la vaguada de este río hasta el raudal del Maipures, pero teniendo en cuenta que desde los tiempos de su fundación el pueblo de Atures se sirve de un camino situado en la orilla izquierda del Orinoco, para salvar los raudales desde frente al citado pueblo de Atures hasta el embarcadero sito al mediodía de Maipures, frente al cerro de Macuriana y en dirección al norte de la boca del Vichada; queda expresamente consignada en favor de los Estados Unidos de Venezuela la servidumbre de paso por el mencionado camino, entendiéndose que dicha servidumbre cesará á los veinticinco años de publicado el presente laudo, ó cuando se construya un camino por territorio venezolano, que haga innecesario el paso por el de Colombia, reservando entre tanto á las Partes la facultad de reglamentar de común acuerdo el ejercicio de esta servidumbre.

*Trozo 2º.* Desde el raudal de Maipures por la vaguada del Orinoco hasta su confluencia con el Guaviare, por el curso de éste hasta la confluencia del Atabapo; por el Atabapo aguas arriba hasta 36 kilómetros al norte del pueblo de Yávita, trazando desde allí una recta que vaya á parar sobre el río Guainía 36 kilómetros al occidente del pueblo de Pimichín y por el cauce del Guainía, que más adelante toma el nombre de río Negro, hasta la piedra del Cocuy.

Dado en el Real Palacio de Madrid por duplicado á diez y seis de marzo de mil ochocientos noventa y uno.

MARÍA CRISTINA.

*El Ministro de Estado,*  
CARLOS O'DONELL.

Lo que se inserta en la Gaceta de Madrid para los efectos del art. 3º del Tratado de Caracas de fecha 14 de setiembre de 1881, por el cual se estipuló que el presente laudo quedaría ejecutoriado por el hecho de publicarse en el periódico oficial.

In his report for 1893 the Colombian minister for foreign affairs, referring to the foregoing award, stated that the governments of Colombia and Venezuela agreed to send out within a certain period a mixed commission to mark the boundary. This commission, however, was not sent out, and Venezuela had dispatched to Bogota a legation of the first class to negotiate with Colombia an arrangement as to the several points relating to the frontiers, as defined in the arbitral sentence. The two governments had embodied their views in an agreement, the text of which he gave. It was dated April 4, 1894, and declared that Venezuela, while fully accepting the arbitral sentence, thought that it would facilitate the settlement of economic and political questions between the two countries if Colombia would "nobly concede, in some parts of the line, a slight rectification," on grounds of mutual convenience and common interest. On the other hand, the Colombian minister for foreign affairs declared that his government accepted in principle the proposal of Venezuela "for certain modifications of the frontier line, which modifications shall be determined after

the conclusion of the treaties which are on the point of being settled referring to commerce and navigation."<sup>1</sup>

**Khedive of Egypt and M. de Lesseps.**—July 6, 1864, the Emperor of France rendered an award as arbitrator in the dispute between M. de Lesseps and the Khedive of Egypt touching the construction of the Suez Canal.<sup>2</sup>

**Khedive of Egypt and Foreign Powers.**—By a decree of January 13, 1883, the Khedive instituted an international commission to adjust claims growing out of the insurrectionary movements which had taken place in Egypt since June 10, 1882.<sup>3</sup>

**FRANCE AND THE ALLIED POWERS (1814).**—By the Peace of Paris of May 30, 1814, Article XIX., the French Government agreed "to liquidate and pay all debts" which it might "be found to owe in countries beyond its own territory on account of contracts or other formal engagements between individuals or private establishments and the French authorities, as well for supplies as in satisfaction of legal engagements."<sup>4</sup> By an identic treaty concluded at Paris November 20, 1815, and forming part of the second Peace of Paris, between France on the one hand and Austria, Great Britain, Prussia, and Russia, respectively, on the other, provision was made for carrying the foregoing stipulation into effect. It was provided that the liquidation should extend to "supplies and deliveries, arrears of pay and allowances, claims of civil hospitals, the restitution of funds intrusted to the French post-offices," certain "bons" and "mandats" and various other specified matters. To this end, the contracting parties agreed to appoint commissions of liquidation for the examination of claims, and commissions of arbitration to decide on cases on which the former commissions should fail to agree.<sup>5</sup>

**France and Chile.**—By a convention signed at Santiago November 2, 1882, similar in terms to that subsequently concluded between Chile and Great Britain (*infra*), it was agreed to refer the claims of French citizens against Chile to a mixed commission. By a protocol signed at Santiago December 30, 1887, the French claims, which numbered 89 and were of the nominal amount of about \$3,400,000, were directly settled by the two governments for \$300,000, Chilean silver.<sup>6</sup>

**France and Chile.**—By a convention of October 13, 1895, expressed in substantially the same terms as the Anglo-Chilean convention of September 26, 1893 (*infra*), it was agreed that the claims of French citizens against Chile, growing out of the civil war in the latter country of 1891, and the subsequent events, should be referred to a mixed commission.<sup>7</sup>

<sup>1</sup> For. Rel. 1894, 200.

<sup>2</sup> The award may be found in Br. and For. State Papers, LV. 1004; de Clerq., IX. 108.

<sup>3</sup> Calvo, Le Droit Int. 4th ed. 468.

<sup>4</sup> Hertlet's Map of Europe by Treaty, I. 342.

<sup>5</sup> Id. 382. The commissioners of liquidation appointed by Great Britain were Messrs. Colin Alexander Mackenzie and George Lewis Newnham; the commissioners of arbitration appointed by the same government were Messrs. George Hammoud and David Richard Morier.

<sup>6</sup> For. Rel. 1883, 97; Id. 1888, I. 181; Calvo, Le Droit International, 4th ed. III. 455, 466; De Martens, Recueil, 2<sup>e</sup> série, IX. 704.

<sup>7</sup> Mr. Strobel to Mr. Olney, No. 47, October 24, 1895, MS. dispatches from Chile.

By an agreement signed at Santiago, February 2, 1896, the two governments settled the claims directly and thus dispensed with the arbitration. The sum total of the claims was upward of 1,000,000 francs. The French Government accepted in discharge of them the sum of £5,000, or about 125,000 francs.<sup>1</sup>

**France, Chile, and Peru: Arbitration of claims on guano funds.**—By a "supreme decree" of February 9, 1882, Chile, then engaged in a successful war with Peru, directed the sale of 1,000,000 tons of guano from deposits situated in Peruvian provinces which she had then conquered and which, as will presently be seen, passed into her hands, with all the liens upon them, at the close of the war. By article 13 of the decree it was provided that the money for which the guano was sold should be equally divided between the Chilean Government and such Peruvian creditors as were secured by pledges of guano; by article 14, that a board of arbitrators should be constituted to liquidate the claims of the creditors in question; and by article 15, that if, within a period of 180 days, the arbitrators should not be appointed by common accord with the creditors, Chile would appoint them directly. Finally, by article 16 of the decree, it was declared that the Chilean Government would deposit a sum equivalent to the moiety destined for the Peruvian creditors in the Bank of England. such deposit to be considered as passing the property to such creditors as should in the manner pointed out establish a title to it.

By the treaty of peace of October 20, 1883, commonly called the treaty of Ancón, Peru ceded to Chile, in perpetuity and unconditionally, the province of Tarapaca. It was further agreed that the provinces of Tacna and Arica should continue in the possession of Chile, subject to Chilean laws and authority, for a period of ten years from the date of the ratification of the treaty, and that at the end of that term a popular vote should decide to which country the provinces should finally belong, the successful party to pay to the other 10,000,000 Chilean silver dollars or Peruvian soles. By Article IV. of the treaty the supreme decree of February 9, 1882, was confirmed, and it was provided that, after the sale of the million tons had been effected, the Government of Chile would continue to pay over to the Peruvian creditors 50 per cent of the net proceeds of guano till the extinction of the debt or the exhaustion of the deposits then being worked. Article VI. reads as follows: "The Peruvian creditors, to whom may be awarded the proceeds stipulated in Article IV., must submit themselves, in proving their titles and in other procedures, to the regulations stated in the supreme decree of February 9, 1882."<sup>2</sup>

The arbitrators were not appointed by common accord within the period prescribed for that purpose, nor did Chile afterwards appoint them alone. On the other hand, by an agreement signed at Santiago January 8, 1890, called the Elias-Castellon protocol, Chile, in order to enable Peru to arrange her foreign debt arising out of loans of 1869, 1870, and 1872, agreed to grant to Peru the 50 per cent deposited or yet to be deposited in the Bank of England under the supreme decree of February 9, 1882, and 80 per cent of the net proceeds since February 9, 1882, of guano taken or yet to be taken from deposits to which the creditors of Peru were entitled. The provisions in the supreme decree and the treaty of peace in relation

<sup>1</sup> For. Rel. 1896, 42.

<sup>2</sup> For. Rel. 1883, 731, 732.

to the arbitration of the claims of the creditors were not recalled in the protocol of January, 1890. As to the effect of that omission Chile and Peru disagreed, the latter contending that, as the result of the credit of the funds to her, the previous stipulation as to arbitration fell, while Chile took the opposite view.

Meanwhile France was pressing upon Chile the payment of a claim of the Messrs. Dreyfuss Brothers & Co., of Paris, growing out of a guano contract which they made with the Peruvian Government in 1869. This claim involved complicated accounts, as well as a question touching the relation in which the claimants stood to the Peruvian Government under the contract.<sup>1</sup> The Peruvian Government denied that anything was due to the claimants, and the same position was maintained by Chile. July 23, 1892, however, M. Bacourt, envoy extraordinary and minister plenipotentiary of France, and Señor Isidore Errazuriz, Chilean minister of foreign relations, signed at Santiago a protocol by which it was agreed that a certain percentage of the net proceeds of guano sold by Chile from February 9, 1882, to January 9, 1890, should be applied to such claims of "French creditors" of Peru as should be allowed by the chief justice of the supreme court of justice of Switzerland, who was designated by the protocol as arbitrator for that purpose. Peru vigorously protested against this arrangement as an attempt to adjust an unliquidated and unacknowledged claim against her by a proceeding to which she was not a party; and when, in June, 1893, Chile and France addressed the Swiss Government on the subject of the arbitration, the Peruvian Government contested their competency to control the matter without its intervention.<sup>2</sup> The Swiss Government gave to the subject special consideration, and on March 24, 1894, communicated its decision to "all the states involved in the matter" by sending them a memorandum in which its views were fully set forth. Its decision was to the effect that the duties of the arbitration would be accepted on condition (1) that the arbitral tribunal should be composed of Dr. Hafner, the actual president of the federal tribunal, and two other members; (2) that it should have power to decide upon its own jurisdiction and on all interlocutory questions, and to pronounce upon all interventions; and (3) to determine all the conditions of the arbitration. These terms were accepted by all the interested governments, including those of Chile, France, Great Britain, and Peru, and the tribunal was duly constituted.<sup>3</sup> The gates were thus opened to all claims of creditors of Peru on the fund in the Bank of England. Among the claims in behalf of which persons have intervened before the arbitral tribunal are those of Landreau and Cochet, in which interests on the part of citizens of the United States have been alleged to exist. The arbitral process is still pending.

**France and Hayti.**—Under a protocol similar in terms to that between Great Britain and Hayti (*infra*) claims of French citizens against the

<sup>1</sup> Memorial of the Peruvian minister of foreign relations of 1891, Appendix.

<sup>2</sup> Rapport du Département Fédéral des Affaires Étrangères (de Suisse) sur sa Gestion en 1893, 30; Memoria que el Ministro de Estado en el Despacho de Relaciones Exteriores presenta al Congreso Ordinario de 1894.

<sup>3</sup> Rapport du Département Fédéral des Affaires Étrangères (de Suisse), 1894, 39; see *id.* 1895.

Haytian Government were adjusted by a mixed commission at Port au Prince. This commission was in session in July 1892.

**France and Mexico.**—By a treaty and a convention, both concluded March 9, 1839, it was agreed to submit to a third power the decision of certain questions growing out of the then recent hostilities between France and Mexico. Her Britannic Majesty was afterwards chosen as arbitrator. She rendered, August 1, 1844, the following award:<sup>1</sup>

"We, Victoria, by the grace of God, Queen of the United Kingdom of Great Britain and Ireland, having accepted the Office of Arbiter, which has been conferred upon us by His Majesty the King of the French and by the President of the Republic of Mexico, by virtue of the notes delivered to our secretary of state for Foreign Affairs on the 26th of June, and on the 8th of July 1843, by the plenipotentiaries of His Majesty and of the President, respectively, with a view of terminating the differences which have arisen between the French and Mexican Governments, on certain points reserved by the Treaty, and also by the convention, concluded between those Governments on the 9th of March, 1839, which points are stated in the Treaty and convention as follows:

"Treaty, article 2.

"In order to facilitate the prompt re-establishment of a mutual good will between the two nations, the contracting parties agree to submit to the decision of a third Power the two questions, namely:

"1st. Whether Mexico has a right to claim from France either the restitution of the Mexican ships of war captured by the French forces subsequently to the surrender of the fortress of Ulloa, or a compensation for the value of the said ships in case the French Government should have already disposed of them.

"2ndly. Whether there is ground for allowing the indemnities which might be claimed on the one side by the French who have suffered injury in consequence of the law of expulsion; on the other side, by the Mexicans who have had to suffer the consequences of hostilities posterior to the 26th of November last."

"Convention, Article 2.

"The question whether the Mexican ships and their cargoes which were sequestered during the blockade, and subsequently captured by the French in consequence of the declaration of war, ought to be considered as legally acquired to the captors, shall be submitted to the arbitration of a Third Power, according as it is declared in article 2nd of the Treaty of this day."

"Having attentively and impartially considered the points thus submitted to us, and having carefully weighed every transaction that took place between the parties from the 16th of April 1838 until the conclusion of the Treaty of the 9th of March 1839,

"Declare, that,

"With regard to the first point stated in the second article of the Treaty and also in the convention, whether Mexico has the right to claim from France either the restitution of the Mexican ships of war captured by the French Forces subsequently to the surrender of the fortress of Ulloa or a compensation for the value of the said ships, in case the French government should have already disposed of them, and whether the Mexican

<sup>1</sup> De Clercq, V. 193.

ships and their cargoes, which were sequestered during the blockade, and subsequently captured by the French in consequence of the declaration of war, ought to be considered as legally acquired to the captors;

"We are of opinion that after the departure of the French Plenipotentiary from Mexico, and the notification which accompanied his departure, followed by the hostile operations on the part of the French against the Fortress of San Juan de Ulloa, and the Mexican fleet, and the actual declaration of war by the Mexican Government: and the expulsion of the French subjects from its territory, there was a state of war between the two countries, and that the terms of the Treaty and Convention recognized its existence;

"Consequently, that France is not bound to make restitution of, or give compensation for, the ships mentioned in the Treaty; or for the ships and cargoes referred to in the second article of the convention.

"With regard to the second point stated in the second article of the Treaty we are of opinion that neither the French subjects, nor the Mexicans, are entitled to any indemnity; the acts of both countries being justified by the state of hostilities between them.

"Given in duplicate, under our hand and seal at our court at Windsor Castle this First day of August, One Thousand eight hundred and forty-four in the 8th year of our Reign.

"VICTORIA.

"ABERDEEN."

**France and the Netherlands.**—By Article VIII. of the treaty of November 20, 1815, heretofore referred to, special provision was made for the settlement by a commission of arbitration of the question growing out of the refusal of France to recognize the claim of the Netherlands for the payment by the former of the interest on the debt of Holland for the half years of March and September 1813. It was provided that the commission should consist of seven members, two of whom should be named by the French Government and two by the Government of the Netherlands. The three remaining commissioners were to be chosen from "States decidedly neuter" and having "no interest in the question, such as Russia, Great Britain, Sweden, Denmark, and the Kingdom of Naples;" and of these three neutral commissioners one was to be named by France and one by the Netherlands and the third by the two thus chosen. The commission was required to meet in Paris February 1, 1816. The members were the Prince of Castelcicala, the Marquis of Marialva, General de Walthersdorff, Baron Pasquier, the Chevalier de Bye, Baron Brierre de Surgy, and General de Fagel. At their session of October 16, 1816, their proceedings, as officially protocolized, were as follows:<sup>1</sup>

"No. XXX.—*Report of the sitting of Wednesday, October 16, 1816.*

"All the members present.

"The minutes of the last meeting were read and approved, as well as the draft of the decision to be made, on the one hypothesis or the other, in favor of France or of the Kingdom of the Netherlands.

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<sup>1</sup>The version here given is a translation of a copy of the original record, in French, graciously furnished to me by the Government of the Netherlands.

"General de Fagel took the floor and explained the reasons that induced him to vote in favor of the Government of the Netherlands.

"Baron Pasquier likewise explained the considerations in support of his conclusions in favor of the French Government.

"The Chevalier de Bye similarly stated his views, and concluded in favor of the Government of the Netherlands.

"Baron Brierre de Surgy explained his reasons in favor of the French Government.

"General de Waltersdorff set forth his reasons in favor of the Government of the Netherlands.

"His Excellency the Marquis de Marialva called the attention of the commission to the fact that there were still one or two questions on which he wished to be enlightened; that he therefore begged his colleagues to allow him to defer his decision till they had spoken a second time, as he was certain he would find in their remarks all the information he needed to settle his opinion.

"His Excellency the Prince de Castelcicala followed, setting forth the reasons that led him to vote in favor of the French Government.

"The members of the commission, beginning with General de Fagel and down to General de Waltersdorff, inclusively, took the floor again in the prescribed order, and, after some new observations and new explanations of the opinions which they had already expressed, declared that they persisted in them.

"His Excellency the Marquis de Marialva stated that the doubts which he had entertained on the first round of the discussion had been removed on the second, and that he voted in favor of the French Government.

"His Excellency the Prince of Castelcicala declared that he continued to be of the opinion which he had already announced in favor of the French Government, after which His Excellency, in his quality of president of the commission, declared the discussion closed.

"They then proceeded to the counting of the votes, and after all the members of the commission had read their conclusions in the order prescribed it was found that the question which the commission had to settle was decided in favor of the French Government by a majority of four votes to three, viz, in favor of the French Government, Baron Pasquier, Baron Brierre de Surgy, His Excellency the Marquis de Marialva, His Excellency the Prince de Castelcicala; in favor of the Kingdom of the Netherlands, General de Fagel, the Chevalier de Bye, and General de Walterstorff. In consequence, the decision of the commission was engrossed according to the draft adopted, was signed at once by all the members, and was entered in the present minutes. The said decision is of the following tenor:

"The commission of arbitration, &c., &c.

"Afterwards three original copies were made which were signed by all the members, and His Excellency the president of the commission was requested to forward one to His Excellency the Duke de Richelieu, minister of state for foreign affairs of His Very Christian Majesty, and another to the envoy extraordinary and minister plenipotentiary of His Majesty the King of the Netherlands at the court of France, the third to remain annexed to these minutes.

"After deliberation, the commission decided that all the statements and written documents submitted to the commission, as well as the minutes of its meetings and all other papers which were in the hands of the clerk, should be deposited in the department of foreign affairs of His Most Christian Majesty, as a continuation of the protocol of the conferences held at Paris by the ministers of the four powers, and to be kept in the same place in order that the interested parties might refer to them whenever it should be needful. In consequence, the clerk was directed to put the said papers together in a parcel, which should be sealed with the seal of His Excellency the president of the commission, to be given into the hands of His Excellency the minister for foreign affairs of France, with the request that the parcel should never be opened except by an order signed by His Excellency.

"His Excellency the president of the commission will request His Excellency the minister for foreign affairs to receive an official certificate of the deposit thus placed in his hands. The clerk is authorized before closing the parcel to exchange the original papers which have been produced by the parties, and which may be claimed by them, and to replace them with certified copies.

"The minutes of the present meeting were read and approved.

"The commission having thus concluded the work which was entrusted to it the president declared that it was dissolved, and all the members signed the present record.

"No. XXXI.—*Decision of the arbitral commission instituted according to article 8 of the convention of November 20, 1815.*

"The arbitral commission, named according to article 8 of the convention of November 20, 1815, to decide which of the two governments, the French Government or that of the Netherlands, should be obliged to pay the overdue interest on the debt of Holland, which was not paid for the half years ending March and September 1813, taking as a basis the provisions of the Treaty of Paris of May 30, 1814; and whether the reimbursement, which the Government of the Netherlands shall in that case make to France, in bonds of countries reunited to its crown and separated from France, may be exacted without deducting the arrears of interest due on the debt of Holland in 1813.

"After having taken cognizance, first, of the statement of the commissioner of accounts of His Majesty the King of the Netherlands, dated June 10, 1816; second, of the statement of the commissioners of accounts of His Most Christian Majesty of the same date; third, of the answer of the commissioner of accounts of His Majesty the King of the Netherlands, dated June 18, 1816, as well as of the proofs which accompanied these different statements, having taken as basis of its decision the provisions of the Treaty of Paris of May 30, 1814.

"Has decided by a majority,

"That the interest on the debt of Holland which may not have been paid for the half years ending March and September 1813, must be paid by the Government of the Netherlands, and that the reimbursement which the Government of the Netherlands shall, in that case, make to France in bonds of countries now belonging to its crown and separated from France,



may be exacted without deducting from the stock of the debt of Holland the interest due in 1813.

"Paris, October 16, 1816.

"PRINCE OF CASTELCICALA.

"MARQUIS OF MARIALVA.

"WALTERSDORFF.

"PASQUIER.

"P. J. DE BYE.

"BRIERRE-SURGY.

"R. FAGEL."¹

**France and the Netherlands: Award of the Emperor of Russia as to the boundary between France and Dutch Guiana.**—For many years a difference existed between France and the Netherlands as to the lines separating their colonies in Guiana. While it was agreed that the river Maroni formed the common boundary, yet a difference arose from the fact that that river, at some distance from the coast, divides into two branches, respectively called the Ava (or Awa) and the Tapanahoni. The Dutch insisted on the former branch, the French on the latter. By a convention signed at Paris November 29, 1888, and subsequently approved by the parliaments of the two countries, France and the Netherlands agreed to submit this dispute to an arbitrator.<sup>2</sup> Having chosen for that office the Emperor of Russia, they sought his acceptance of it by means of identic notes, addressed to the Russian minister for foreign affairs. In due time they were notified of the Emperor's acceptance; and they afterward submitted to him, in accordance with the convention, their statements and proofs, which were simultaneously presented to M. de Giers, Russian minister for foreign affairs, by the representatives of the two governments, in order that they might be laid before the arbitrator. No exchange of the documents was made or requested. The Emperor appointed a commission to examine the subject in controversy; and his award, bearing date May 13-25, 1891, was communicated to the parties through the usual diplomatic channels.

"Nous, Alexandre III. par la grâce de Dieu, Empereur de toutes les Russies,

"Le Gouvernement des Pays-Bas ayant résolu, aux termes d'une Convention conclue entre les deux pays, le 29 novembre 1888, de mettre fin à l'amiable au différend qui existe touchant les limites de leurs colonies respectives de la Guyane française et de Surinam, et de remettre à un arbitre le soin de procéder à cette délimitation, nous ont adressé la demande de nous charger de cet arbitrage;

"Voulant répondre à la confiance que les deux puissances litigantes nous

<sup>1</sup>The original text of the decision is: Que les intérêts de la dette de Hollande, qui n'auroient pas été acquittés pour les semestres de mars et de septembre 1813, doivent être payés par le gouvernement des Pays-Bas, et que le remboursement que le gouvernement des Pays-Bas sera dans le cas de faire à la France des inscriptions de dettes des pays réunis à sa couronne et détachés de la France, peut être exigible sans déduction des rentes de la dette de Hollande arriérées sur les échéances de 1813.

<sup>2</sup>De Martens, Nouveau Recueil Général de Traité, Deuxième série, XVI. 731.

ont ainsi témoignée, et après avoir reçu l'assurance de leurs Gouvernements d'accepter notre décision comme jugement suprême et sans appel et de s'y soumettre sans aucune réserve, nous avons accepté la mission de résoudre comme arbitre le différend qui les divise et nous tenons pour juste de prononcer la sentence suivante :

"Considérant que la Convention du 28 août 1817, qui a fixé les conditions de la restitution de la Guyane française à la France par le Portugal n'a jamais été reconnue par les Pays-Bas ;

"Qu'en outre cette Convention ne saurait servir de base pour résoudre la question en litige, vu que le Portugal, qui avait pris possession, en vertu du traité d'Utrecht de 1713, d'une partie de la Guyane française, ne pouvait restituer à la France en 1815 que le territoire qui lui avait été cédé : or les limites de ce territoire ne se trouvent nullement définies par le traité d'Utrecht de 1713 ;

"Considérant, d'autre part :

"Que le Gouvernement hollandais, ainsi que le démontrent des faits non contestés par le Gouvernement français, entretenait à la fin du siècle dernier des postes militaires sur l'Awa ;

"Que les autorités françaises de la Guyane ont maintes fois reconnu les nègres établis sur le territoire contesté comme dépendant médiatement ou immédiatement de la domination hollandaise, et que ces autorités n'entraient en relation avec les tribus indigènes habitant ce territoire que par l'entremise et en présence du représentant des autorités hollandaises ;

"Qu'il est admis sans conteste par les deux pays intéressés que le fleuve Maroni, à partir de sa source, doit servir de limite entre leurs colonies respectives ;

"Que la commission mixte de 1861 a recueilli des données en faveur de la reconnaissance de l'Awa comme cours supérieur du Maroni ;

"Par ces motifs :

"Nous déclarons que l'Awa doit être considéré comme fleuve limitrophe, devant servir de frontière entre les deux possessions.

"En vertu de cette décision arbitrale, le territoire en amont du confluent des rivières Awa et Tapanahui doit appartenir désormais à la Hollande, sans préjudice, toutefois, des droits acquis, bona fide, par les ressortissants français dans les limites du territoire qui avait été en litige.

"Fait à Gatchina, le 13-25 mai 1891.

"Signé :

ALEXANDRE

"Contresigné :

GIERS."<sup>1</sup>

**France and Nicaragua: CASE OF THE "PHARE."**—In November 1874 some cases of arms were seized by the Nicaraguan authorities on board of the French ship *Phare*, at Corinto, and were confiscated. The master of the ship protested against these measures as violative both of the law of nations and of the treaty of amity and commerce between the two countries. The French Government having intervened in the matter, the Government of Nicaragua proposed to submit the difference to the arbitration of the court of cassation at Paris. This proposal was accepted, and by a convention of October 15, 1879, the court was empowered to take

<sup>1</sup> The substance of this decision is that the boundary is formed by the Awa, the river claimed by the Dutch.

the case into consideration and to render a final award. The procedure in the arbitration was regulated by the court. A final decision was rendered July 19, 1880. It was as follows:<sup>1</sup>

"On the plea of *res judicata* set up by the Republic of Nicaragua, and founded on the judgment rendered June 14, 1876, by the supreme court of justice of Leon, in the proceedings against Captain William Alard.

"Whereas the difference the determination of which is submitted to the arbitration of the court, has arisen between the French Government and the Republic of Nicaragua on account of the seizure, made on board the ship *Phare* by the authorities of Corinto, of arms and munitions belonging to Captain Alard; whereas the French Government, considering this act to be contrary to the law of nations and to the stipulations of the treaty of commerce with Nicaragua of April 11, 1859, has in vain demanded, under the conditions prescribed by article 35 of the said treaty, the reparation of the damage caused to one of its nationals; and whereas there followed a long correspondence, and, after the diplomatic discussion was deemed to be exhausted, the Government of Nicaragua proposed, as a means of ending the difference, to submit it to the arbitration of the court of cassation of France; and whereas, this proposition having been agreed to, a convention was on October 15, 1879, concluded, the terms of which, conformably to the understandings expressed in the diplomatic correspondence, precisely determined the object of the arbitration, and unequivocally defined the powers which, by common accord, the parties had conferred on the court; whereas it was expressly agreed by the said convention that the court should have power not only to take into consideration all the facts on which the claim was based, but also, in case Nicaragua should be deemed responsible, to fix the indemnity which should be paid to Captain Alard; whereas, in the presence of such stipulations, it is impossible not to recognize the fact that it was the common intention of the two governments to invest the arbitral tribunal with all power and jurisdiction for the purpose of reviewing and estimating the litigated facts as a whole, and of pronouncing definitively on the difference which had arisen between them, independently of what was decided by the judicial authority of Nicaragua in respect of Captain Alard.

"The plea is rejected;

"And deciding the case on its merits:

"Seeing that it appears by the documents produced that Captain Alard, having left Bordeaux on the ship *Phare* at the end of the year 1873, was met, in June 1874, at Amapala (Honduras) by the French barque *Jean-Pierre*, which brought him a certain number of cases of firearms called rifles, with a supply of cartridges; that these cases, having been transhipped to the *Phare*, were on board of her when at three different times, June 18, October 6, and November 17, the ship cast anchor at Corinto, the principal port of the Republic of Nicaragua; that a few days after the entry of the ship into the port on the last occasion those arms and munitions were seized on board by the authorities of Corinto;

"Seeing that, according to the claim of Nicaragua, the seizure was

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<sup>1</sup>The version here given is a translation from the French text of the award, as printed in De Card's *Les Destinées de l'Arbitrage International*, 237.

justified (1) because, contrary to the prohibitions of the local legislation, Captain Alard had introduced the said arms and munitions as contraband into the port of Corinto, and (2) because he had attempted to introduce them into the territory of Nicaragua;

"Considering, as to the first reason, that the local legislation, notably the executive decree of July 3, 1849, and the federal customs law of Feb-27, 1837, authorized in a general manner the seizure of all things not entered on the manifest, and, besides treating as contraband the commerce in articles the importation or exportation of which was prohibited, specially authorized the seizure of arms introduced without the prior permission of the government, their introduction being lawful under the terms of said laws, only when it was so authorized;

"But considering that it is not established that there was on the part of Captain Alard any violation of the provisions of the law either as to the obligations relative to the manifest or as to the regulations touching the introduction of arms of war;

"That, on the one hand indeed, the arms that were seized appeared on the manifest of November 16, 1874, which expressly disclosed 'four cases of muskets, two packages of revolvers, three cases of cartridges;' that, as a fact, those detailed descriptions were not found in the manifests of June 18 and October 6 relative to the two preceeding voyages; but that, even admitting that there had been an omission and defect in those two manifests, the irregularity would have been covered by the last manifest of November 16, and could not in any case, after Captain Alard had put himself right, justify the seizure, which would have been just and lawful only if it had taken place at the moment when the offense was committed and ascertained;

"That, on the other hand, the introduction of a thing by a port or into a port consists not in the simple fact of entering the port, but in that of going beyond the line of the custom-house and transporting the merchandise into the interior of the country; that article 11 of the federal law, which forbids all communication 'with the port' before the deposit of the manifest, itself indicates that what the law means by the port is the town and not the space where ships anchor; that fraudulent introduction is not predicated of a ship which enters the port and submits itself to the formalities of the maritime custom-house; that such was the situation of the *Phare* on November 22 and 30, the dates of the seizure; that it doubtless belonged to the local authority, if on any ground it considered the presence of arms in the port of Corinto to be dangerous, to refuse to allow the captain to remain there; but that it could not, when the existence of those arms on board was regularly revealed by the manifest, make the seizure on the pretext of a fraudulent introduction;

"Considering, as to the alleged attempt at clandestine introduction, that article 53 of the decree of July 22, 1861, containing a regulation for the custom-house of Corinto, directs that articles shall be seized when there shall be an attempt clandestinely to introduce them; that thus, in point of law, the attempt to introduce, as well as the consummated introduction, is capable of justifying the seizure; but that it is necessary that the attempt should be established in its essential features; that, according to Nicaragua, the acts which impressed that character upon the transaction in question consisted (1) in the fact that the arms, though they remained on board of the *Phare* from the month of June to November 22,

1874, the date of the first act of seizure, were not manifested either on June 18, when the *Phare* first entered Corinto, or on October 6, when she made her second voyage; (2) in the fact that, on the latter voyage, at the moment when the *Phare* came into the port of Corinto, the second officer went in a small boat to request of the commandant permission, which was refused him, to cast anchor near the point of Castanones; (3) in the fact that finally, on the same voyage, a musket was sent to Mr. Pedro Brenes and transmitted by the latter, as a sample, to Mr. Guyot, agent of Captain Alard, at Leon; but that these facts, even admitting that they were accomplished with the design, ascribed by the Government of Nicaragua to Captain Alard, of clandestinely introducing warlike arms into the port and on the territory of the republic, constituted merely preparatory acts, and could not be considered as the beginning of the execution of the crime or as a punishable attempt, which alone could have justified the seizure which the Government of Nicaragua thought it its duty to order.

"Seeing that, from all that precedes, it follows that the damage caused to Captain Alard in respect of his property is not explained away by any act legally and juridically imputable to him; that if, nevertheless, the Government of Nicaragua decided to order the measure which occasioned the damage, it clearly appears from all the diplomatic correspondence and from the evidence collected on the investigation at Corinto that it was for an end purely political, with the idea of social conservation, and with a view to prevent the arms seized from falling into the hands of a revolutionary party whose manœuvres and designs the government was then engaged in foiling; that if, having been adopted under such conditions, measures of that nature constituted acts of legitimate defense, it is nevertheless true that they could be carried out only on the responsibility of the government which thought it right to adopt them and under the obligation to make reparation to those who were the victims of the damage thus caused; that from this point of view therefore, and for reasons of this kind, the Government of Nicaragua ought to be declared responsible.

"Considering, in what concerns the indemnity to be paid to Captain Alard, that the documents produced, and especially the appraisements made at Corinto, afford the necessary elements for determining the amount, and that a sufficient indemnity will be made to Captain Alard by allowing to him the following amounts: (1) The sum of 39,720 francs for the value of the muskets on board of the *Phare* at the date of the seizure, at the rate of 40 francs each; (2) the sum of 600 francs, at which the value of the cartridges seized has been fixed.

"On these grounds the Government of Nicaragua is declared responsible.

"The indemnity to be paid to Captain Alard is consequently fixed at the sum total of 40,320 francs, with interest on these damages at the rate of 12 per cent a year from November 30, 1874, the date of the last act of seizure.

"The expenses are to be borne by the Government of Nicaragua."

France and Spain: Questions of Prize.—"We, William III., by the grace of God, King of the Netherlands, Prince of Orange-Nassau, Grand Duke of Luxemburg, &c., &c., &c.

"Having accepted the functions of arbitrator, which have been con-

<sup>1</sup> The agreement of arbitration and the French text of the award may be found in De Clercq, VI. 81, 170.

ferred upon us by the note of the minister resident of Spain and that of the envoy extraordinary and minister plenipotentiary of France to our minister of foreign affairs, dated respectively February 27 and March 28, 1851, in virtue of a declaration signed between those powers at Madrid on the 15th of February 1851, in the difference that has arisen between them on the subject of the ships *Velos Mariana*, *Victoria*, and the *Figie*, seized respectively February 22, 1823, July 15 of the same year, and January 12, 1824;

"Animated with the sincere desire to respond by a scrupulous and impartial decision to the confidence that the High interested Parties have evidenced and to give them a new pledge of the high value we attach to it;

"Having to that end duly examined and maturely weighed with our Council of Ministers, the convention concluded between Spain and France on the 3d of January 1824, as well as the statements with their exhibits, which the minister resident of Spain and the envoy extraordinary and minister plenipotentiary of France have submitted to our minister of foreign affairs, under date respectively of July 25 and June 21, 1851;

"Wishing to fulfil the obligations that we have contracted by the acceptance of the functions of arbitrator in the above-mentioned difference, by bringing to the knowledge of the high parties interested the result of our examination and our opinion on each of the three questions contained in the act signed between them on February 15, 1851, viz:

"1st. Whether the capture and the sale of the *Velos Mariana* were, or not, legitimate, and whether this ship is, or not, comprised in Article I. of the convention of January 5, 1824;<sup>1</sup>

"2d. Whether the *Victoria* ought, or no, to be included among the prizes which form the subject of Article I. of the convention of 1824—the ship having been restored, the question applies only to the cargo; and

"3dly. Whether Spain must, or not, consider as analogous cases, from the point of view of the convention of 1824, the cases of the *Velos Mariana* and the *Figie*, and whether she is, or not, right in her refusal to pay the indemnity she acknowledges to be due to the owners of the latter ship, until France has consented to discharge, by compensation or in some other manner, the indemnity relative to the *Velos Mariana*.

"As to the first question, it is a fact—

"That the Spanish vessel, the *Velos Mariana*, leaving the port of Vera Cruz on the 24th of December 1822, bound for Cadiz, was chased and subse-

<sup>1</sup> January 5, 1824, a convention between France and Spain was signed for the purpose of regulating the subject (as the preamble declared) of "captures during the preceding year." By Article I. of this convention it was stipulated that whereas "the Spanish ships captured by the vessels of His Most Christian Majesty, together with their cargoes, are estimated at a value approximately equal to the prizes made by Spanish vessels and cruisers of the commerce of France," "the prizes reciprocally made and conducted into the ports of the power which made such prizes shall belong to each of the two governments, subject to the charge of regulating as they shall judge convenient the indemnities due to their respective subjects, France and Spain mutually renouncing all right of recovery in that regard." (Br. and For. State Papers, XI. 20.)

quently taken on the 22d of February 1823 by the French ship of the line the *Jean Bart*, cruising in the waters of the Antilles for the purpose of protecting French commerce;

"That the commandant of the *Jean Bart* gave as a reason for this seizure that there had been provocation and a hostile intention on the part of the Spanish captain, who in the darkness fired a cannon shot at the vessel that gave him chase, without having shown his colors;

"That the *Veloz Mariana* was first taken to Martinique and then to Brest;

"That, being brought into this latter port at the time the war had begun, the vessel was sequestered and subsequently sold by order of the French authorities, notwithstanding the protests of the owners and the claims of the Spanish Government;

"And considering—

"That it is proved by history, and not contested by the high interested parties, that the beginning of the war of 1823, or of the armed intervention in Spain, could not be set at a date prior to the 8th of April of that year, when the *Bidasoa* was crossed by the French army, and that, therefore, the *Veloz Mariana*, seized on the 22d of February preceding, was not captured during that war;

"That the expression, 'vessels captured during the preceding year'—'las preas hechas en el año 1823'—which the high parties have used in the preamble of the convention of January 5, 1824, in view of the manifest intention of the contracting parties, and conformably to international law, can be interpreted only in the sense that it relates to captures made during the war of 1823, of which the said convention was invoked in part to determine the consequences;

"That the seizure of a vessel previous to the period when a war breaks out cannot be considered as a maritime capture in war;

"That the reasons which induced the commandant of the *Jean Bart* to take the *Veloz Mariana*, whether justifiable or not, could in no case give to the arrest the character of a capture in war, nor have any other legal consequences than to involve the personal responsibility of the captain of the *Veloz Mariana* and to give rise to a judicial inquiry;

"That neither could the sequestration of the *Veloz Mariana* in the port of Brest at a time when the war was begun be equivalent, under international law, to a maritime capture;

"We are of opinion that the seizure and the sale of the *Veloz Mariana* could not be considered as a legitimate capture and sale, and that this vessel does not come within Article I. of the convention of January 5, 1824.

"As to the second question, it is a fact—

"That on the 15th of July 1823 the Spanish frigate *Victoria*, coming from Manila, was arrested in sight of Cadiz by the French squadron, taken to the port of San Lucar de Barrameda, in Andalusia, then occupied by the French troops, and sequestered;

"That during this sequestration a part of the cargo of the vessel was used for the service of the French army and fleet;

"That after the signing of the convention of January 5, 1824, the Spanish Government claimed in behalf of the owners the restitution of the *Victoria*, which had remained sequestered;

"That the French Government, without recognizing the right which the Spanish Government alleged in support of its demand, nevertheless con-

sented to restore this vessel, of which the Spanish Government declared that it wished to make use to carry dispatches to the Philippine Islands;

"That after the restitution of the *Victoria* and of the remaining part of its cargo the Spanish Government, relying upon the precise text of Article I. of the convention of January 5, 1824, claimed damages for the part of the cargo removed during the sequestration;

"That the French Government refused to satisfy this claim, holding that the taking of the *Victoria* fell under the application of Article I. of the said convention; that therefore no indemnity was due and that no right could be inferred from the voluntary restitution of the vessel and of the remaining part of the cargo;

"And considering—

"That by Art. I of the convention of January 5, 1824, it was stipulated 'that the prizes reciprocally made and conducted into the ports of the power that made such prizes shall belong to each of the two governments';

"That, the validity of the seizure of the *Victoria* not having been contested, it is sufficient to examine whether this prize was taken into a port of the power that made it;

"That, in order to determine the meaning of this stipulation according to the common intention of the high contracting parties, it is indispensable to take into consideration the exceptional circumstances with which the convention of January 5, 1824, is connected;

"That by this convention, concluded between the ambassador of His Most Christian Majesty and the minister of state of His Catholic Majesty, the high contracting parties had it in view to regulate, in respect to maritime prizes, the consequences of a war that had existed between France and the government of His Catholic Majesty on one side, and the Spanish Independents on the other;

"That it results from this fact, established by history, that the question, whether the port of San Lucar de Barrameda was a port of the power by which the *Victoria* was taken, can not be considered exclusively on the score of nationality, but must be decided according to the respective situations of the then belligerent parties, one of which (the Spanish Independents) was represented in the convention of January 5, 1824, by the government of His Catholic Majesty, as its successor in fact, and the other by the French Government, which had just fought, conjointly with His Catholic Majesty, the said Independents.

"That it is conceded and of public notoriety that the port of San Lucar de Barrameda, at the moment when the *Victoria* was taken there, was not only subject to the authority of the government of His Catholic Majesty, ally of France, but also under the immediate power of the French Army, whence it results that the capture of the *Victoria* falls, according to the common intention of the high contracting parties, under the application of Art. I. of the convention of January 5, 1824;

"That this interpretation, conformable to the principles of international law, which, in relation to prizes of war, declare the cause of allied powers to be common, is not invalidated by the restitution of the *Victoria* and the untouched portion of her cargo, since a tacit acquiescence in a contested claim can not be deduced from that single fact;



"We are of opinion:

"That the ship *Victoria* must be comprised among the prizes that form the subject of Article I. of the convention of January 5, 1824.

"As for the third question, it is a fact:

"That the French frigate, the *Vigie*, was captured on the 12th of January 1824, on the coast of Peru by a Spanish privateer and taken to the port of San Carlos de Chiloe;

"That a judicial examination having been begun on the validity of the capture, it was immediately declared null by a judgment of the Tribunal of Arequipa, of July 7, 1824;

"That this judgment was recognized by the Spanish Government as having the force of finality;

"That the Intendancy of Arequipa in consequence ordered the restitution of the ship and of its cargo;

"That that order could not be carried out, because the colonial authorities had disposed of the cargo for the public needs of the colony and had armed the ship for a cruise, and it had since fallen into the hands of the Peruvian Independents;

"And considering:

"That the capture of the *Vigie*, made three months after the close of the war, was null according to Article 5 of the convention of January 5, 1824;

"That it was declared invalid by a competent tribunal, which ordered its complete and immediate restitution, and that the Spanish Government recognized the validity and the obligatory force of that judgment;

"That, hence, the debt due to the owners of the *Vigie* is liquidated and not contested by the Spanish Government, and that thus no absolute reason exists for making the restitution of the ship and its cargo or the indemnity for its loss depends upon the solution of the difference relative to the *Veloz Mariana*,

"We are of opinion:

"That Spain can not consider as analogous, from the point of view of the convention of 1824, the cases of the *Veloz Mariana* and of the *Vigie*, and that she is not justified in her refusal to pay the indemnity she acknowledges to be due to the proprietors of the latter ship until France has consented to settle by compensation, or in some other manner, the indemnity relative to the *Veloz Mariana*.

"Done and given under our royal seal, at The Hague, this 30th of April of the year of grace one thousand eight hundred and fifty-two.

[L. S.]

WILLIAM."

"The Minister of Foreign Affairs:

"V. SONSBEECK.

**France and Venezuela.**—By a convention between these powers in 1864 provision was made for the decision by a mixed commission of the "claims of French subjects for expropriations, damages, and injuries of the nature of those for which, according to the law of nations, the government of the republic [of Venezuela] is responsible."<sup>1</sup>

<sup>1</sup> United States and Venezuelan Commission, convention of December 5, 1885, Opinions, 308, 309.

France and Venezuela: Award of the President of the Swiss Confederation in the case of Fabiani.<sup>1</sup>—Le Président de la Confédération Suisse, arbitre désigné pour trancher le différend existant. (Affaire Fabiani) entre Le Gouvernement de la République Française, *partie demanderesse*, et Le Gouvernement des Etats-Unis du Vénézuéla, *partie défenderesse*.

Vu les exposés et les conclusions des parties, ainsi que les preuves administrées.

Considérant qu'il en résulte :

A.—*En fait.*

I. Les Gouvernements de la République Française et des Etats-Unis du Vénézuéla sont convenus, par compromis signé à Caracas le 24 février 1891, de soumettre à l'arbitrage du Président de la Confédération Suisse, la question de savoir si, "d'après les lois du Vénézuéla, les principes généraux du droit des gens et la Convention (du 26 novembre 1885) en vigueur entre les deux Puissances contractantes, le Gouvernement vénézuélien est responsable des dommages que Fabiani dit avoir éprouvés pour dénégations de justice," et de charger l'arbitre "de fixer, au cas où cette responsabilité serait reconnue pour tout ou partie des réclamations dont il s'agit, le montant de l'indemnité pécuniaire que le Gouvernement vénézuélien devrait verser entre les mains de M. Fabiani, et qui effectuerait en titres de la dette diplomatique de Vénézuéla 3 %."

L'arbitrage ayant été accepté, la procédure fut instruite par voie d'échange de mémoires et par l'administration de preuves tant littérales que testimoniales offertes par les Gouvernements intéressés.

II. Les faits allégués dans la *demande* sont les suivants :

M. Antoine Fabiani épousa, en avril 1867, la fille de M. Benoît Roncayolo, chef d'une maison d'armement de voiliers, à Marseille. Roncayolo suspendit ses paiements, le 31 août de la même année, et fut déclaré en état de faillite. Son gendre Fabiani, qui était alors avocat près la cour de Bastia, s'efforça de sauver la situation. Au bout de deux ans, il put informer son beau-père, établi à Maracaïbo, qu'il avait obtenu un concordat pour ce dernier; il paya lui-même le dernier dividende de 10%.

Fabiani fixa son domicile à Marseille. Un oncle lui avança de fortes sommes d'argent, et lui-même chercha désormais à reconquérir la fortune perdue par Benoît Roncayolo. Dans ce but, et afin de conserver le monopole presque exclusif des rapports maritimes et commerciaux de Maracaïbo avec la France, monopole exercé naguère par Roncayolo, il acheta d'abord le navire *Pauline*; il développa ensuite ses affaires d'exportation et d'importation et affecta cinq trois-mâts à ce service, sans parler d'un puissant remorqueur destiné à la barre et au lac de Maracaïbo. Trois maisons furent successivement fondées au Vénézuéla, à Caracas, à Mara-

<sup>1</sup> The President of the Swiss Confederation was authorized by the federal committee November 1, 1892, to accept the post of arbitrator under the convention. (Rapport du Département Fédéral des Affaires Étrangères, 1892, p. 34.) A statement of the claim was filed, and a period was then fixed for the presentation of the Venezuelan answer. The French Government submitted a reply. These papers having been exchanged, an order was made by the arbitrator in regard to the taking of proofs. (Id. 1894, p. 38.

caibo, à La Guayra; Fabiani y intéressa son beau-père et son beau-frère André Roncayolo, qui reçurent l'attribution de la moitié des bénéfices.

Mais bientôt Fabiani découvrit que les Roncayolo avaient commis des malversations à son préjudice, au Vénézuéla. Il se vit obligé d'interdire à son beau-père toute participation officielle aux opérations de la maison Fabiani et de restreindre les pouvoirs du fils Roncayolo. Le 7 décembre 1874, B. Roncayolo n'en renouvela pas moins, en son nom, le contrat de remorquage passé avec le Président de l'Etat vénézuélien de Zulia, en engageant la responsabilité de "ses" établissements de commerce fondés sous la raison sociale Antoine Fabiani et C<sup>ie</sup>. Fabiani arrêta net toutes les affaires d'exportation, prohiba tous tirages de traites, exigea la restitution de ses avances et la prompte liquidation de ses intérêts. Il dut néanmoins se convaincre que les Roncayolo travaillaient à "une spoliation qui serait facilitée par la vénalité des pouvoirs judiciaires du Vénézuéla." Il se disposait à recourir aux tribunaux français, les conditions de l'association ayant été arrêtées à Marseille, quand, sur les instances de Roncayolo fils, il consentit à une solution amiable du conflit.

La transaction, signée à cette occasion, date du 31 janvier 1878. Intervenue entre Antoine Fabiani et André Roncayolo, elle constat que B. Roncayolo n'a jamais fait d'apports en argent, elle défère au Tribunal de Marseille toutes les difficultés qui pourraient s'élever au sujet de son exécution, elle constitue Roncayolo fils débiteur de la somme de 617,895 fr. 10, valeur au 31 janvier 1878. D'autre part, la maison Roncayolo de Maracaibo devait être remplacée par une succursale de la maison Fabiani, de Marseille, succursale qui serait dirigée par A. Roncayolo, à l'exclusion de toute ingérence de Roncayolo père.

Les anciennes irrégularités reprochées aux Roncayolo se renouvelèrent. Fabiani révoqua les pouvoirs de Roncayolo fils et lui substitua un sous-agent, auquel Roncayolo père s'empessa de marier sa fille cadette. Il y avait 6 à 700,000 fr. de traites à payer. Fabiani comprit que sa présence au Vénézuéla était nécessaire. Il partit le 3 novembre 1879, non toutefois sans avoir introduit instance à Marseille contre ses deux fondés de procuration; les tribunaux de Marseille étaient compétents, en effet, et du reste, B. Roncayolo avait écrit, le 14 juin 1879, que la justice vénézuélienne se laissait corrompre à prix d'argent.

Au Vénézuéla, Fabiani réclama, en toute première ligne, le paiement d'une somme de 105,458 fr. 75, représentée par cinq traites que lui avaient été délivrées, pour des transports d'émigrants, par les consuls du Vénézuéla à Marseille et à Ténériffe. MM. Roche et Cie., auxquels ces traites avaient été remises pour l'encaissement, refusèrent de les restituer, sous prétexte qu'elles avaient été données en gage par acte du 6 mars 1877, acte frauduleux d'après la demande. Le dossier de ces traites avait d'ailleurs disparu et le cabinet de Caracas annula ses ordres de paiement antérieurs. Si Fabiani ne poursuivait pas l'affaire au criminel, c'est qu'on l'en dissuada vivement. Les Roncayolo, le directeur du Ministère des Finances et un comparse auraient collaboré à cette machination.

On méconnut également les droits de Fabiani, comme propriétaire du vapeur *Pauline*, pour services rendus à l'Etat par ce navire pendant la révolution qui ramena M. Guzman Blanco au pouvoir. B. Roncayolo avait touché 55,000 fr. sur ce qui était dû à Fabiani, au lieu des 30,000 fr. qu'il

avait avoir perçus; le Ministère des Finances ne permit pas au véritable créancier de faire constater ce détournement.

Fabiani tenta en vain d'obtenir du tribunal de commerce de Caracas la nullité du gage invoqué par MM. Roche et Cie. La restitution des traites fut bien ordonnée, mais, aussitôt après, le tribunal rejeta une requête à fin d'exécution provisoire du jugement, par la raison que Fabiani, étranger au pays, devait, au préalable, fournir un cautionnement. Fabiani annonça qu'il était en mesure d'offrir toutes les garanties désirables, son vapeur *Pauline* étant arrivé à La Guayra. Mais, quand il voulut verser au dossier sa patente de navigation, il découvrit qu'elle était au nom de "Roncayolo-Fabiani" bien qu'elle lui eût été accordée à lui, comme propriétaire unique, en avril 1879. Il y avait là un audacieux abus de pouvoir commis par A. Roncayolo junior, au mépris de la transaction de 1878.

Le vapeur *Pauline*, réquisitionné par le Gouvernement vénézuélien pour aider à la répression d'une émeute, allait regagner son port d'attache. B. Roncayolo, comme représentant de Roncayolo-Fabiani, sollicitait le paiement d'une somme de 63,000 fr. due de ce chef. Fabiani s'y opposa et le montant de la réclamation, arrêté par l'Etat au chiffre de 57,780 fr., fut consigné en mains tierces pour le compte de la maison Antoine Fabiani de Maracaïbo, car, selon la demande, les Roncayolo étaient plus sûrs des autorités judiciaires de cette dernière ville que celles de Caracas. Au demeurant, M. Guzman Blanco, chef de l'Etat, qui était associé dans de grandes entreprises avec B. Roncayolo, son agent politique, s'app préparait à intervenir directement dans le conflit.

De graves soupçons appelant Fabiani à Maracaïbo, il s'y rendit en avril 1880, mais il y trouva presque vide la caisse de son agence; André Roncayolo l'avait pillé. Après bien des pourparlers et des démêlés avec celui-ci, Fabiani comprit qu'il serait obligé de capituler, tant le terrain était bien préparé contre lui à Maracaïbo.

En revanche, B. Roncayolo était de plus en plus en faveur auprès de M. Blanco, avec lequel il était intéressé dans la grosse affaire du chemin de fer de la Ceiba à Sabana de Mendoza; l'obstination que Fabiani mettait à défendre ses droits dérangeait des combinaisons politico-financières importantes. M. Stamman, ministre plénipotentiaire d'Allemagne à Caracas, aura, dit la demande, renseigné son Gouvernement sur les attentats et les injustices dont Fabiani fut victime durant ce séjour à Maracaïbo.

En attendant, on lui avait enlevé le service du remorquage, on s'était emparé de ses navires, et la cour suprême avait confirmé la sentence qui déposait Fabiani. Il ne restait plus à ce dernier qu'à retourner en France et à implorer la protection de son Gouvernement, si les autorités judiciaires et administratives du Vénézuéla continuaient à se liguer contre lui. C'est alors qu'un ami vint lui proposer de le sortir d'embarras, moyennant qu'il consentît à une révision de la transaction de 1878 par un arbitrage. Fabiani, cédant à la force majeure, accepta de suspendre toutes poursuites et actions, et de signer un compromis qui sauverait peut-être l'avenir de son commerce au Vénézuéla.

Le tribunal arbitral, réuni à Marseille, statua en date du 15 décembre 1880; ses décisions, aux termes du compromis, étaient exécutoires au Vénézuéla, sans délai et sans qu'on pût admettre contre elles aucun recours. La sentence qu'il rendit peut se résumer ainsi:

1°. Les comptes de Fabiani furent reconnus exacts; le débit d'André

Roncayolo fut fixé à la somme de 538,359 fr. 07 cent., toute réclamation lui étant interdite au sujet des dits comptes;

2°. L'entreprise du remorquage fut déclarée la propriété exclusive de Fabiani, depuis le 30 novembre 1877, comme aussi les vapeurs *Eclair*, *Mara*, *Pauline*, et les engins et accessoires destinés au service du remorquage. Fabiani fut autorisé à reprendre l'administration de ce service, "pour en régler la gestion à sa convenance, sans que M. Benott Roncayolo, ni M. André Roncayolo, ni aucun tiers puissent s'y immiscer directement ou indirectement," l'insertion du nom de B. Roncayolo dans l'acte de concession "ayant été la conséquence d'une faute." B. Roncayolo était tenu cependant, à peine de dommages et intérêts, de laisser son nom figurer dans l'entreprise, si Fabiani le jugeait plus conforme à ses intérêts, ou si le Gouvernement vénézuélien se refusait à modifier la concession sur ce point;

3°. Tous les produits du remorquage, depuis le 30 novembre 1877, y compris les bénéfices du pilotage dès la même date, furent attribués à Fabiani; les personnes qui les avaient touchés avaient l'obligation de les lui restituer;

4°. B. et A. Roncayolo furent condamnés solidairement au coût de l'enregistrement de la sentence arbitrale et de ses annexes.

Le compromis liait Fabiani, de même que Roncayolo père et fils, qui y avaient adhéré tous les deux. La sentence, rendue par deux arbitres, qui étaient, l'un, le frère et créancier de B. Roncayolo, l'autre, l'oncle et créancier de Fabiani, fut enregistrée à Marseille le 17 décembre 1880 et déclarée exécutoire le 21 même mois par le président du tribunal de première instance de cette ville.

Les Roncayolo formèrent opposition à l'exécution de la sentence arbitrale, en requérant l'annulation du compromis de Caracas et la révocation de l'ordonnance d'exequatur. Déboutés par jugement du tribunal de première instance de Marseille, du 1<sup>er</sup> avril 1881, ils interjetèrent appel; mais la cour d'appel d'Aix confirma la décision du tribunal de Marseille par son arrêt du 25 juillet suivant, et il n'y eut pas de pourvoi en cassation.

Avant le prononcé de l'arrêt d'appel, Fabiani, qui était retourné en Europe, repartit pour Caracas dans le but d'introduire et de diriger la procédure d'exécution. Mais divers indices et renseignements lui firent craindre de nouvelles difficultés. Trois jours après son arrivée à Caracas vers la fin de mai 1881, Fabiani écrivit à M. Guzman Blanco pour lui annoncer que le paiement d'une somme de plus de 40,000 fr., réclamé au Gouvernement par B. Roncayolo, devait être effectué entre ses mains à lui, Fabiani, en vertu de la sentence arbitrale du 15 décembre 1880; il le priait, en même temps, de différer le paiement de la dite somme. Cette lettre demeura sans réponse. Le 7 juin 1881, il déposa au greffe de la haute cour fédérale l'original et la traduction du dossier de l'arbitrage, ainsi qu'une demande d'exequatur.

Il ne s'agissait, en l'espèce, que d'une simple formalité, à moins d'une véritable dénégation de justice de la part de la haute cour (art. 556 et suiv. C. proc. civ. vénéz.). Des renvois, des incidents, des intrigues retardèrent la solution de l'affaire. En fin de compte, bien qu'il eût été établi au cours des plaidoyers, par des documents irrécusables, que l'ordonnance d'exécution du président du tribunal de Marseille avait été confirmée aussi bien en appel qu'en première instance, la haute cour fédérale, le 11 novembre 1881, se déclara, par cinq voix contre quatre, incompétente pour donner force exécutoire à la sentence arbitrale, attendu, "qu'on ne peut considérer comme un tribunal de France la réunion des arbitres qui a eu

lieu à Marseille," et qu'une ordonnance judiciaire d'exécution "ne peut convertir en juges de la nation ceux qui ne le sont pas et en sentence d'un tribunal étranger ce qui est simplement le complément d'un contrat" (*Annexe 1*, de la défense, p. 23 et suiv.).

Les quatre juges formant minorité protestèrent, dans des "réserves" motivées, la sentence arbitrale satisfaisant, selon eux, à toutes les conditions prescrites par l'art. 557 du Code de procédure civile vénézuélien et son assimilation à un jugement ordinaire n'étant pas contestable.

Une nouvelle instance fut introduite, et, le 6 juin 1882, la haute cour fédérale, dont la composition avait partiellement changé dans l'intervalle, "déclarait exécutoire au Vénézuéla la sentence de la cour d'appel d'Aix." Fabiani, sur le conseil d'un ami, communiqua ce résultat à M. Blanco, qui, au lieu de respecter les décisions judiciaires intervenues, commença par mander à son ministre des finances de verser à B. Roncayolo une somme de 28,000 fr. due à Fabiani pour emploi récent du vapeur *Pauline* dans l'intérêt de l'Etat. Fabiani ne s'empessa pas moins, malgré l'hostilité du pouvoir, de requérir l'exécution effective du jugement arbitral. Il s'embarqua pour Maracaïbo; une inscription hypothécaire fut prise, dès le 14 juin 1882, contre B. et A. Roncayolo sur tous les droits leur appartenant dans le chemin de fer et sur la douane de la Ceiba, et une autre inscription, de 120,000 fr., sur la section Trujillo du chemin de fer. Mais les Roncayolo, soutenus au reste par le président de l'Etat de Trujillo, venaient, par un contrat frauduleux, de céder tous leurs droits à un tiers.

Le juge de première instance, à Maracaïbo, ordonna l'exécution de la sentence au bénéfice de laquelle se trouvait Fabiani; les Roncayolo demandèrent alors sa récusation. Il se récusa d'abord, puis se ravisant, débouta les opposants de leurs conclusions formulées contre sa dernière décision et décréta l'envoi en possession des navires, le 14 juillet 1882.

Sur ces entrefaites, Fabiani tomba malade de la fièvre jaune. La procédure d'exécution fut suspendue sans raisons plausibles; en particulier, le juge, qui n'aurait dû admettre aucun pourvoi contre le mandat d'exécution par lui décerné, accueillit, avec effet dévolutif seulement, il est vrai, l'appel interjeté contre son décret. Les adversaires de Fabiani recoururent au juge supérieur, qui attribua à l'appel un double effet, dévolutif et suspensif. Tout acte de procédure était interdit jusqu'à ce qu'il eût été prononcé en instance d'appel.

L'admission de l'appel à deux effets violait la loi, ainsi que la haute cour fédérale le reconnut, dans son arrêt du 8 décembre 1883, en déclarant que l'exécution avait été interrompue par "des recours illégaux lorsqu'il s'agit de l'exécution d'une sentence." Aux yeux de Fabiani, le juge-président de la cour supérieure était l'instrument des Roncayolo. Fabiani souleva le recours de fait devant la cour supérieure contre la décision de ce magistrat et le récusa du même coup. Il rentra bientôt après en Europe, en confiant la garde de ses intérêts à ses amis et représentants.

Trois motifs de récusation avaient été invoqués. Les ennemis de Fabiani, désireux d'en finir, parvinrent à faire modifier la constitution de l'Etat de Falcon-Zulia, dans le sens que, "pour les cas de récusation du juge supérieur, son suppléant n'aurait plus besoin d'être docteur en jurisprudence," et que, pour connaître de la récusation, la cour suprême formerait une liste d'avocats et de citoyens, parmi lesquels le gouverneur—qui était le frère d'un des avocats des Roncayolo—choisirait le suppléant.

Le juge-suppléant désigné pour statuer sur le premier motif de récusation

tion, l'écarta, et se retira dès qu'il eut à se prononcer sur le deuxième. Il fut remplacé par une créature des Roncayolo et de leurs alliés, qui débouta Fabiani. Une troisième récusation ayant été proposée pour manifestation d'opinion le magistrat la déclara irrecevable, parce qu'une formalité de procédure ne fut pas remplie ensuite d'un oubli. La décision fut aussitôt frappée d'appel; il refusa d'admettre le pourvoi et la cour suprême fut saisie.

Entre temps, les autorités, à en croire les lettres des fondés de pouvoirs de Fabiani, considéraient les vapeurs de celui-ci comme leur bien. On escomptait l'annulation du mandat d'exécution et l'on se promettait d'écraser Fabiani en exigeant de lui le remboursement immédiat des recettes du remorquage, les frais judiciaires et les honoraires des avocats poursuivants.

Il y avait un moyen encore de conjurer les efforts des Roncayolo: provoquer l'intervention de l'exécutif fédéral, qui, d'après le sec. 17 de l'art. 13 de la constitution, devait veiller à l'exécution "des décrets et ordres" que les "tribunaux de la fédération rendraient dans l'exercice de leurs attributions et de leurs facultés légales." Le ministre de l'Intérieur, invité à agir, le 2 juillet 1883, répondit, le 9 même mois, que "l'Exécutif national a décidé que c'est à la haute cour fédérale qu'il appartient de faire observer ses dispositions et que c'est à elle que doit s'adresser l'intéressé."

Fabiani revint devant la haute cour. Mais, dans l'intervalle, pour détruire par anticipation l'effet d'une décision nouvelle, le Président de la République, M. Guzman Blanco, par une résolution du 21 août 1883, approuva la cession frauduleuse du contrat de chemin de fer de la Ceiba consentie par B. Roncayolo, soustrayant ainsi les biens d'un débiteur à l'action d'un créancier. Enfin, le 8 décembre 1883, la haute cour décida que le juge de première instance devait continuer une exécution illégalement arrêtée depuis le 14 juillet 1882.

Le 28 janvier 1884 le juge compétent décerna un mandat d'exécution, qui visait spécialement les droits et actions de B. Roncayolo dans le chemin de fer et sur la douane de la Ceiba. Cette décision du juge de Maracaibo devait précipiter les événements. La *Gaceta Oficial*, du 21 février 1884, notifia que, par un contrat daté de la veille, le service du remorquage, des bouées et du pilotage dans la lagune et sur la barre de Maracaibo, dont Fabiani venait d'être remis en possession paisible, était concédé à un prête-nom de B. Roncayolo. Or, ce contrat apparaissait comme un acte de vengeance; coïncidence singulière, il fut signé le jour même où M. Blanco avait dû résigner ses fonctions présidentielles entre les mains de son successeur.

Dès qu'on connut à Maracaibo le contrat du 20 février 1884, qui causait un préjudice matériel et moral considérable à Fabiani, le crédit de celui-ci fut sérieusement ébranlé et sa maison menacée d'une catastrophe.

Bien plus, au même moment, le 23 février 1884, la cour suprême de Falcon-Zulia, soulevant un conflit de compétence, déniait à la haute cour fédérale le droit de faire exécuter la sentence arbitrale et ordonnait la transmission du dossier à un tribunal spécial, pour voir annuler l'arrêt du 8 décembre 1883.

Cet arrêt de conflit, suivant de si près le retrait du remorquage, mettait Fabiani en présence d'un tribunal qui n'avait jamais fonctionné et dont la composition était à la discrétion du pouvoir exécutif; il était d'ailleurs

entaché d'arbitraire, comme le Gouvernement et la haute cour l'avaient reconnu implicitement, l'un le 9 juillet, l'autre le 8 décembre 1883. Mais on espérait ramener ainsi la procédure à son point de départ, anéantir tous les actes postérieurs au 9 juillet 1883, et livrer Fabiani à des juges complaisants.

Le 4 mars 1884, le Gouvernement accordait en outre à B. Roncayolo, pour le chemin de fer de la Ceiba, une subvention mensuelle de 2,000 fr., qui, toute minime qu'elle fût, n'en était pas moins destinée à montrer où allaient les sympathies officielles. Le chemin de fer avait bien été cédé par Roncayolo six semaines auparavant, mais la cession, revêtue cependant de l'approbation du chef de l'Etat, s'évanouissait, car Roncayolo avait toujours été en fait le propriétaire de la ligne. Seulement, il n'avait plus rien à craindre de Fabiani, et, par un subterfuge, les droits de Roncayolo pouvaient être rendus illusoire, s'il le fallait, pour contrecarrer son adversaire.

Fabiani retourna au Vénézuéla en mai 1884. Le tribunal d'exception, qui aurait dû statuer d'office et sans délai sur l'arrêt de conflit, ne se réunissait point. L'influence de M. Blanco demeurait prépondérante et sa haine s'acharnait contre Fabiani. Tout était perdu, d'autant plus que, le 26 octobre 1885, B. Roncayolo devait céder à nouveau ses droits sur la ligne la Ceiba pour la somme de 298,600 fr., dont 178,600 déjà reçus, en sorte qu'il ne restait plus que 120,000 fr., juste la valeur de l'inscription hypothécaire incomplète, prise au nom de Fabiani le 16 juin 1883, et des terrains qu'on eût vendus pour rien au cours d'une expropriation forcée. Seule, une donation déguisée, ou toute autre machination, pouvait expliquer l'abandon, à ce prix, d'une ligne de 50 kilomètres, qui avait été construite à grand frais et qui devait donner, pour l'exercice de 1890 à 1891, un bénéfice net de près de 400,000 fr.

Le Gouvernement approuva ce transfert, bien qu'il fût notoire au Vénézuéla que Fabiani avait des réclamations très considérables à faire valoir contre les Roncayolo et que le contrat du 26 octobre 1885 dépouillât ses débiteurs. Il ne fallait pas, poursuit la demande, songer à intenter une action paulienne, devant les tribunaux de l'Etat de Trujillo, au fond des Cordillères, puisque après des années, Fabiani n'avait pu obtenir, à Caracas and Maracaibo l'exécution de jugements inattaquables. Plus tard, B. Roncayolo réussit à se faire octroyer une autre concession de chemin de fer, qui a représenté, pour lui, un bénéfice annuel de 225,000 fr. en 1892.

La demande rappelle encore que, le 21 novembre 1885, la France et Vénézuéla signèrent une convention pour la reprise des négociations diplomatiques et que Fabiani fut, quelque temps après déclaré en état de faillite au Vénézuéla, pour défaut de paiement immédiat d'un montant inférieur au tiers des sommes indument retenues par le Gouvernement défendeur. Elle cherche à prouver que la convention de 1885 est inapplicable au différend Fabiani et conclut à la réparation du dommage causé, pour faits du prince et dénis de justice, par les autorités administratives et judiciaires de l'Etat du Vénézuéla; dommage dont l'Etat est responsable, et qui comprend :

- 1°. La réparation du tort éprouvé;
- 2°. Le gain manqué;
- 3°. Les intérêts calculés dès la date des actes dommageables;
- 4°. Les intérêts composés;



5°. Les sacrifices faits par la partie lésée pour le maintien de son industrie;

6°. Le préjudice résultant des dépenses faites et du temps perdu pour arriver à l'exécution des sentences;

7°. Les dommages à considérer comme la suite nécessaire des délits;

8°. Le dommage causé par la privation du travail à l'avenir;

9°. La réparation du préjudice moral.

L'état des réclamations Fabiana est spécifié comme suit dans le demande en capital et intérêts capitalisés:

*Etat A. Liquidation des sentences.*

	Francs.
1°. Solde créiteur au 31 août 1879, réduit à .....	509, 183. 70
Intérêts .....	630, 966. 02
2°. Annuités totales en vertu du contrat de mariage du 20 avril 1867, du 24 avril 1877 à pareille date de 1892, la transaction de 1878 ayant liquidé la situation antérieure, en capital .....	150, 000. 00
Intérêts .....	96, 701. 00
3°. Perte éprouvée sur la vente de la moitié des marchandises qui restaient à liquider à Marseille—poste dû, d'après la transaction du 31 janvier 1878 .....	24, 296. 72
Intérêts .....	33, 926. 58
4°. Recettes du pilotage, suivant sentence arbitrale:	
(a) du 1 <sup>er</sup> décembre 1877 au 30 novembre 1878 .....	16, 000. 00
Intérêts .....	21, 428. 58
(b) du 1 <sup>er</sup> décembre 1878 au 30 novembre 1879 .....	16, 000. 00
Intérêts .....	19, 310. 00
(c) du 1 <sup>er</sup> décembre 1879 au 30 novembre 1880 .....	16, 000. 00
Intérêts .....	17, 311. 32
(d) du 1 <sup>er</sup> décembre 1880 au 30 novembre 1881 .....	12, 500. 00
Intérêts .....	12, 051. 38
(e) du 1 <sup>er</sup> décembre 1881 au 15 juillet 1882 .....	7, 812. 45
Intérêts .....	6, 981. 23
5°. Indemnité pour emploi du vapeur <i>Pauline</i> , solde (abus de confiance B. Roncayolo), année 1879 .....	25, 000. 00
Intérêts .....	31, 517. 50
6°. Indemnité pour services rendus par les vapeurs de Fabiani (abus de confiance B. Roncayolo), année 1879 .....	45, 885. 00
Intérêts .....	56, 239. 80
7°. Rémunération due pour vapeur <i>Pauline</i> , ensuite du sauvetage du navire anglais <i>Angel</i> (abus de confiance B. Roncayolo), année 1879 .....	47, 653. 32
Intérêts .....	59, 563. 63
8°. Somme payée pour le compte de B. Roncayolo et comprise dans le montant des condamnations pécuniaires prononcées par le tribunal de commerce de Marseille, mais ne faisant pas double emploi avec des sommes dues en vertu de la transaction de 1878—année 1879 .....	8, 363. 84
Intérêts .....	10, 724. 38

	Francs.
9°. Détournement d'une somme payée par l'Etat, pour vapeur <i>Pauline</i> (voyage de mai 1879 à La Guayra).....	10,000.00
Intérêts .....	12,176.38
10°. Détournement d'une somme payée par l'Etat de Zulia pour vapeur <i>Pauline</i> (voyage à Coro), année 1879 .....	9,100.00
Intérêts .....	11,080.49
11°. Frais du vapeur <i>Pauline</i> employé à la répression de l'insurrection de Pio-Rebollo (détournement B. Roncayolo), année 1880 .....	28,000.00
Intérêts .....	31,716.67
12°. Intérêts 1% par mois du 1 <sup>er</sup> juillet 1879 au 31 octobre 1880, perçus sur les 30,000 fr. de titres détournés par B. Roncayolo (p. 639 et 647 de la demande) .....	4,800.00
Intérêts .....	5,242.14
13°. Assurances du vapeur <i>Pauline</i> du 1 <sup>er</sup> janvier 1880 au 15 juillet 1882, pendant la spoliation .....	19,333.33
Intérêts .....	19,238.45
14°. Produit net du remorquage en 1880 .....	100,000.00
Intérêts .....	107,180.33
15°. Produit net du remorquage en 1881 .....	100,000.00
Intérêts .....	94,453.13
16°. Produit net du 1 <sup>er</sup> janvier au 15 juillet 1882 .....	54,166.51
Intérêts .....	48,403.73
17°. Somme détournée par les Roncayolo pour service des vapeurs, en 1879.....	42,550.00
Intérêts .....	38,023.10
18°. Somme allouée pour services du vapeur <i>Pauline</i> pendant l'insurrection d'avril et mai 1882 .....	28,000.00
Intérêts .....	25,485.07
19°. Solde restant dû sur les 17,880 fr. alloués par l'Etat pour le vapeur <i>Pauline</i> , année 1880.....	9,780.00
Intérêts .....	10,084.94
20°. Frais judiciaires jusqu'au 30 juin 1882, réduits à .....	100,000.00
Intérêts .....	89,712.96
Total de l'Etat A .....	2,877,129.10
Déductions à faire avec intérêts, et comprenant, entre autres, une somme de 79,536 fr. 12 relative au poste No. 1 ci-dessus. ....	204,954.96
Montant du compte des sentences .....	2,672,174.14

Etat. B. Cet état forme, plus ou moins, un supplément du précédent; il se réfère aussi en partie à des décisions judiciaires non connexes avec la sentence arbitrale, mais demeurées sans effet par la faute des pouvoirs publics du Vénézuéla.

	Francs.
1°. Versement du capitaine Santi non entré en caisse, année 1878 .....	8,000.00
Intérêts .....	11,385.58
2°. Montant de traites fournies de Maracaibo et Caracas sous la signature de Fabiani et non versé à la caisse de l'agence, année 1878.....	90,701.64
Intérêts .....	128,867.36

	Francs.
3°. Débours détournés par B. Roncayolo, année 1879 .....	31, 009. 24
Intérêts .....	38, 545. 56
4°. Débit personnel de B. Roncayolo envers l'agence Fabiani, année 1879 .....	24, 985. 80
Intérêts .....	30, 154. 74
5°. Déficit de caisse imputable à A. Roncayolo, 31 janvier 1879 .....	29, 610. 44
Intérêts .....	39, 198. 47
6°. Prélèvements avoués et illicites de A. Roncayolo 31 mars 1880 .....	35. 136. 44
Intérêts .....	43, 161. 83
7°. Sur primes payés à la caisse générale des familles, 1 <sup>er</sup> octobre 1879 et 1 <sup>er</sup> mai 1881, de 4,000 fr. l'une, pour les risques résultant des voyages de Fabiani au Vénézuéla. ....	8, 000. 00
Intérêts .....	9, 038. 28
8°. 5 novembre 1880, frais de séjour à Caracas, avec famille. .	11, 250. 00
Intérêts .....	12, 267. 78
9°. Même date, frais de voyage et retour avec famille .....	18, 000. 00
Intérêts .....	19, 629. 38
10°. 31 août 1880, frais de voyage et séjour à Caracas, avec M. Tedeschi, en juillet et août 1880 .....	4, 800. 00
Intérêts .....	5, 339. 63
11°. 7 novembre 1882, frais de séjour à Caracas avec famille pendant 14 mois .....	37, 000. 00
Intérêts .....	35, 317. 65
12°. Frais de voyage aller et retour avec famille, 5 novembre 1882 .....	18, 500. 00
Intérêts .....	17, 658. 80
13°. Crédits réels ou supposés faits induements par A. Roncayolo et dont le recouvrement a été impossible, année 1880 .....	120, 000. 00
Intérêts .....	139, 657. 79
14°. Staries et surestaries de <i>Mathieu-Orenga</i> , du 24 mai au 15 août 1880, sur 166 tonnes de jauge, suivant tarif légal. ....	12, 948. 00
Intérêts .....	14, 535. 18
15°. Staries et surestaries du <i>César-Etienne</i> , 318 tonnes, du 24 juin au 1 <sup>er</sup> octobre 1880 .....	29, 910. 00
Intérêts .....	32, 968. 96
16°. Staries et surestaries des <i>Deux-Amis</i> , 24 juillet au 9 octobre 1880, 186 tonnes .....	13, 734. 00
Intérêts .....	15, 105. 91
17°. Staries et surestaries des <i>Deux-Amis</i> , 1 <sup>er</sup> avril au 15 juillet 1882, 186 tonnes .....	18, 786. 00
Intérêts .....	16, 706. 92
18°. Remise à A. Roncayolo, 5 novembre 1880 .....	4, 800. 00
Intérêts .....	5, 185. 24
19°. Complément de frais judiciaires de 1883 à 1886 .....	160, 000. 00
Intérêts .....	135, 023. 56
20°. Perte des capitaux détenus par Roche & C <sup>ie</sup> et montant des traites d'immigration (assignations 23 mai 1877) ...	347, 814. 32
Intérêts, y compris ceux du poste n° 21 ci-dessous...	583, 716. 68

	Francs.
21°. Frais judiciaires, etc. (les intérêts sont portés au numéro précédent).....	28, 000. 00
Total de l'Etat B.....	2, 386, 451. 18
Déductions consenties (avec intérêts).....	234, 304. 96
Montant du compte B.....	2, 152, 146. 22

L'Etat C concerne le service du remorquage; il se monte, valeur au 30 juin 1893, à la somme de ..... 1, 916, 948. 35

Le retrait du service du remorquage équivaut à une dénegation de justice, puisque le Gouvernement restituait, par l'intermédiaire d'un prête-nom, aux Roncayolo, une source de revenus annuels considérables que le jugement arbitral avait attribués à Fabiani. Le contrat de remorquage du 7 décembre 1874 avait été conclu pour une durée de dix ans; le non-renouvellement du contrat, en 1884, ne fut qu'un acte de représailles dirigé par les pouvoirs publics contre l'adversaire des Roncayolo.

	Francs.
Etat D... { En capital.....	4, 200, 000. 00
{ En intérêts.....	3, 544, 369. 12

Les dommages et intérêts compris dans cet état correspondent aux sacrifices faits pour le maintien de l'industrie de Fabiani et au gain dont il a été frustré. Les frais généraux de la maison de Maracaibo étaient de 52,720 fr. par an, soit plus de 350,000 fr. pour sept années. A cela il faut ajouter, par 172,571 fr. 93, les frais généraux de la maison de Marseille, par 102,660 fr. 18, les dépenses personnelles du ménage Fabiani, par 589,423 fr. 39, le compte d'agios et intérêts, plus le fret de plusieurs milliers de tonnes perdu par suite du mauvais vouloir des autorités, soit 100,000 fr. au minimum, le déficit de 100,000 fr. sur le produit de la vente des navires, le maintien de l'industrie huilière exploitée par Fabiani (au moins 100,000 fr.), et d'autres pertes et sacrifices pécuniaires représentant un capital de plus d'un million et demi et de près de 2,800,000 fr. avec les intérêts calculés dès le 1<sup>er</sup> janvier 1883. D'un autre côté, Fabiani aurait pu, dans des conditions ordinaires, réaliser un bénéfice net de 200,000 fr. par an, si son commerce d'importation n'avait pas été arrêté par l'acte délictueux du 7 décembre 1874 jusqu'à la transaction de 1878 et repris ensuite dans des circonstances particulièrement difficiles. L'industrie huilière aurait rapporté, en outre, près de 200,000 fr. par an.

	Francs.
Etat E... { En capital.....	5, 500, 000. 00
{ En intérêts.....	2, 847, 995. 01

Ce poste se réfère à la réparation du préjudice immédiat et direct, causé depuis le 30 avril 1886, époque à laquelle Fabiani était prêt à réduire amiablement ses réclamations aux pertes éprouvées, en éliminant tous les dommages et intérêts qui dériveraient des actes de M. Blanco. Celui-ci refusa d'entrer en matière. La faillite de Fabiani fut déclarée pour non-paiement d'une somme de 70,000 fr. au plus, alors qu'on lui devait des millions au Vénézuéla, et les juges de Maracaibo allèrent même jusqu'à solliciter les présidents des tribunaux de première instance de Paris et de Marseille de faire publier l'avis de faillite dans les journaux les plus répandus de ces deux villes. Cette faillite a eu de désastreuses conséquences et le Gon-

vernement vénézuélien est responsable des dénis de justice qui l'ont déterminée.

France.

Etat F. Frais du procès international..... 200,000

Dans cette somme sont compris, entre autres, les frais d'installation de Fabiani et de sa famille, à Paris, depuis 1886.

A ces préjudices commerciaux vient s'ajouter le dommage éprouvé dans l'affaire du chemin de fer de la Ceiba; l'exécution des sentences aurait permis à Fabiani de se substituer, dès 1881, à ses débiteurs, en exerçant tous leurs droits et actions (concession de la ligne, exploitation de la douane, etc.). Cette entreprise, que Fabiani eût menée à bien, a produit, dans les conditions les plus défavorables, un bénéfice net supérieur à 250,000 fr. par an; le revenu net a été de 389,164 fr. 87 pour l'exercice 1890 à 1891 et il doit être aujourd'hui de plus d'un million. Or la concession était accordée pour une période de près d'un siècle.

La partie demanderesse récapitule ses états de dommages et intérêts et arrive aux totaux suivants, valeur au 30 juin 1893:

	France.
1°. Préjudices commerciaux .....	22,944,563.17
2°. Affaire de la ligne de la Ceiba.....	24,000,000.00
<b>Total général.....</b>	<b>46,944,563.17</b>

III. Dans sa *défense*, le Gouvernement vénézuélien relève d'abord le fait que l'objet du litige est "le déni de justice allégué par Fabiani, pour non-exécution, selon lui, de la sentence arbitrale rendu en sa faveur à Marseille, le 15 décembre 1880, homologuée par le tribunal civil de première instance et confirmée par la cour d'appel d'Aix; et le point de départ ne peut être autre que l'arrêt par lequel, à la date du 6 juin 1882, la haute cour fédérale du Vénézuéla a donné force exécutoire dans le pays à la sentence de la cour d'appel d'Aix."

Or la sentence arbitrale décidait: 1°, que l'entreprise du remorquage devait être mise sous le nom de Fabiani; 2°, que les vapeurs *Eclair*, *Mara*, et *Pauline* et tout l'ontillage de l'entreprise du remorquage appartenaient à Fabiani; 3°, que, pour règlement de compte, André Roncayolo restait débiteur de Fabiani de la somme de 538,539 fr. 07 cent. Les faits antérieurs à la décision de la haute cour fédérale du 6 juin 1882 ne rentrent point dans l'objet du litige actuel, en sorte que toute la question à trancher tient, en somme, dans ces mots: la sentence arbitrale a-t-elle été exécutée conformément aux lois vénézuéliennes, et la suspension de la procédure d'exécution est-elle imputable aux autorités de l'Etat défendeur, ou à Fabiani?

En particulier, Fabiani a tort de considérer comme un déni de justice l'arrêt du 11 novembre 1881, émané de la haute cour fédérale. La jurisprudence française elle-même reconnaît que l'arbitre volontaire étant un mandataire et non un magistrat, cette circonstance enlève à sa sentence le caractère d'un jugement proprement dit. Et si cet arrêt reposait sur de fausses appréciations juridiques, il ne faut pas oublier, qu'à la date du 6 juin 1882, la haute cour déclara les sentences françaises exécutoires, lorsque Fabiani eut déposé en forme authentique la décision de la cour d'appel d'Aix (art. 558 C. proc. civ. vénéz.).

Les clauses du compromis de Caracas, du 7 août 1880, qui, en prescrivant

l'exécution immédiate et sans recours possible au Vénézuéla, rendaient, d'après la demande, toute comparution inutile devant la haute cour fédérale, sont manifestement contraires aux principes généraux du droit, car aucun Etat ne renonce, en faveur des institutions d'un autre Etat ou de conventions entre parties, aux règles fondamentales de sa législation. L'*exequatur* doit être ordonné, dès lors, suivant la procédure fixée par la loi du pays dans lequel il est requis. La cour avait l'obligation de citer l'adversaire de Fabiani, et, s'il l'exigeait, de l'entendre.

Quant aux dénis de justice rentrant dans les termes du compromis, ils n'existent pas. L'arrêt du 6 juin 1882 a été exécuté; les tribunaux vénézuéliens ont accordé à Fabiani tout ce qu'il a réclamé; s'il y a eu des retards, c'est qu'il s'en produit dans toute exécution entravée par un défendeur qui cherche à faire valoir ses droits ou à gagner du temps, et que Fabiani les a provoqués lui-même, soit par des récusations intempestives, soit par son ignorance des lois applicables en l'espèce; et enfin, la sentence arbitrale a été exécutée en conformité du droit vénézuélien, jusqu'au moment où Fabiani déserta la procédure. Effectivement, le 6 juillet 1882, le juge Mendez ordonne l'exécution à Maracaïbo, sur requête de Fabiani. Les Roncayolo forment opposition, mais ils sont déboutés dès le 11 juillet, et le magistrat dispose: "Ce jour étant le quatrième depuis que l'ordonnance d'exécution a été rendue (art. 301 C. proc. civ.), un mandement sera adressé au juge du municipe de San-Raphaël en désignant les immeubles et autres objets que Roncayolo père et fils doivent remettre à Fabiani . . . pour qu'il le mette en possession des dits objets, faisant usage de la force en cas de nécessité." Le 12 juillet, le tribunal du municipe de San-Raphaël met Fabiani en possession des vapeurs *Eclair*, *Mara* et *Pauline*; le 14 même mois, l'entreprise du remorquage passe entre ses mains. Si le juge de première instance admit l'appel d'André Roncayolo avec effet seulement dévolutif, si le juge supérieur l'accueillit, lui, à deux effets, et si l'exécution demeura naturellement suspendue jusqu'au jugement sur l'incident, il n'y a là rien d'illégal. Ce sont les récusations non motivées de Fabiani qui ont entraîné des retards, en arrêtant toute la procédure pendant près d'une année. Après avoir tenté, par trois fois, de récuser le juge supérieur, il récusait encore le président de la cour suprême qui venait d'autoriser son appel à l'égard de la sentence prononcée sur la troisième récusation.

En somme, Fabiani envisagea qu'il avait tout gain à interrompre la procédure et il n'exerça contre les juges dont il flétrit après coup les actes prétendument illégaux et criminels, aucun des recours donnés par les lois nationales. Les erreurs qu'il a pu commettre n'engagent pas non plus la responsabilité de l'Etat défendeur; l'art. 2 du Code civil vénézuélien porte que "l'ignorance des lois ne dispense pas de l'obligation de les observer."

Fabiani affirme bien, sans preuves sérieuses, que le pouvoir exécutif fédéral intervenait abusivement dans la procédure d'exécution. Mais c'est lui-même qui sollicita l'intervention du Gouvernement, en se fondant sur une interprétation erronée du sec. 17 de l'art. 13 de la constitution. La séparation des pouvoirs existe au Vénézuéla comme en Suisse et ailleurs. Fabiani a été mal conseillé ou mal inspiré.

Le 10 juillet 1883, le fondé de pouvoirs de Fabiani s'adresse de nouveau à la haute cour fédérale pour qu'elle enjoigne au juge d'exécuter

l'arrêt du 6 juin 1882; le 8 décembre, la cour fait droit à ces conclusions. C'était, au dire de Fabiani, la condamnation du système de tergiversations inauguré par le juge supérieur; s'il en est ainsi, il devait procéder contre ce dernier en application de l'art. 341 du Code pénal vénézuélien, sous peine de perdre son recours. Les étrangers ne sauraient se réclamer de privilèges que les nationaux n'ont point. D'ailleurs, le 19 janvier 1884, le tribunal de Maracaïbo ordonne l'exécution des sentences françaises; le 8 février, le représentant de Fabiani requiert l'embargo sur les droits et actions de Roncayolo dans la douane et le chemin de fer de la Ceïba; le lendemain, le mandataire d'André Roncayolo forme opposition, en alléguant que la haute cour fédérale n'était pas compétente; le 13 février, le tribunal de première instance écarte la demande de l'opposant; le 23 cependant, sur requête d'André Roncayolo, la cour suprême de justice de l'Etat rend son arrêt de conflit, et, en se basant sur l'art. 50 C. proc. civ. vénéz., le tribunal suspend l'exécution.

Au lieu de faire trancher le conflit de compétence par le tribunal extraordinaire que prévoit l'art. 16 de la loi du 16 mai 1882, Fabiani abandonna la procédure, en prétextant qu'il chercherait en vain à obtenir justice au Vénézuéla. Or la cour suprême de l'Etat Falcon avait uniquement revendiqué (cfr. art. 89 de la Const. vénéz.) l'autonomie judiciaire d'un des Etats confédérés, comme elle en avait le droit; tant que la question de compétence n'était pas résolue, Fabiani ne pouvait se plaindre d'un déni de justice. Et il avait, au surplus, la faculté de rechercher le tribunal en dommages et intérêts, si l'arrêt de conflit avait été injustement rendu (art. 57 C. proc. civ. vénéz.). A ce moment, en effet, il n'avait pas d'action contre le Vénézuéla, mais contre la cour suprême de l'Etat Falcon. Il avait à suivre la voie que la loi trace aux étrangers comme aux nationaux; et il lui était interdit d'exiger une indemnité de la nation, avant d'avoir épuisé les recours légaux.

Relativement au service du remorquage, le Vénézuéla pouvait dénoncer le contrat du 7 décembre 1874 pour son échéance; ce qu'il a fait, en disant que le nouveau contrat n'entrerait en vigueur qu'à l'expiration des dix années de la concession antérieure, soit dès le 8 décembre 1884. L'Etat n'avait pas perdu son droit souverain, parce que Fabiani avait des contestations judiciaires au Vénézuéla avec des particuliers.

L'hypothèque prise sur la douane de Ceïba, même en admettant que les droits des Roncayolo—au reste, cédés à un tiers—fussent susceptibles d'hypothèque, ne pouvait produire d'effets légaux avant un jugement rendu sur l'opposition formée par le gouvernement de la section de Zulia. L'inscription hypothécaire, de 120,000 fr., radiée le 3 septembre 1887, par les syndics définitifs de la faillite Fabiani, n'entre plus en ligne de compte, d'autant plus qu'une inscription résultant d'une sentence étrangère ne saurait être la conséquence immédiate de celle-ci, mais seulement de l'exequatur accordé par les tribunaux nationaux. Quant au contrat du 21 octobre 1885, Fabiani devait l'attaquer au moyen de l'action paulienne, s'il le tenait pour frauduleux; il s'en est bien gardé, et il crie au déni de justice avant même d'avoir saisi les autorités judiciaires.

En outre, la convention franco-vénézuélienne de 1885 n'est nullement contraire au principe de la non-rétroactivité des lois. Conforme à tous égards aux lois antérieures (art. 10 de la Const., art. 5 du décret du 14 février 1873), elle ne donne ouverture à l'action diplomatique que lorsque

les étrangers ont épuisé les recours légaux. Le ministre de France à Caracas, dans sa note du 3 août 1887, a reconnu "que les réclamations élevées de ce chef (pour dénis de justice) rentrent dans les prévisions de l'art. 5 de la convention du 26 novembre 1885." Cet acte est, de plus, réservé dans le compromis du 24 février 1891, et, s'il n'était pas applicable à l'affaire Fabiani, toutes les réclamations de ce dernier seraient, aux termes du décret du 10 février 1873, justiciables de la haute cour fédérale.

Le Gouvernement défendeur critique ensuite l'état de dommages et intérêts de la partie demanderesse. La plupart des indemnités réclamées sont exclues par les termes mêmes du compromis. Fabiani n'est, au demeurant, créancier, que des Roncayolo. La faute des autorités vénézuéliennes n'est pas mieux établie que la responsabilité de l'Etat. Toute la demande repose sur des affirmations de Fabiani qui n'ont aucune valeur, ni en fait ni en droit.

La défense conclut dès lors à ce qu'il plaise à l'arbitre de décider que le Venezuela n'est pas responsable des dommages que Fabiani dit avoir éprouvés pour dénégations de justice.

IV. Dans sa *réplique*, le Gouvernement demandeur constate, entre autres, qu'il appartient à l'arbitre de déterminer souverainement le point de départ des dénégations de justice prétendues par Fabiani, le compromis étant rédigé en termes très généraux. Le déni de justice est nettement défini à l'art. 288 du C. pén. vénéz., et la définition en est très large.

Il convient de remarquer encore que l'arrêt du 11 novembre 1881, qui est en contradiction flagrante avec celui du 6 juin 1882, équivaut à une dénégation de justice dont les conséquences ont été très graves; les motifs de cet arrêt sont inadmissibles. Il y a eu violation des art. 556 à 558 C. proc. civ. vénéz. et refus d'exécution d'une sentence définitive dans le sens de la convention du 26 novembre 1885. L'arbitre, en consultant le *Diario* de la haute cour fédérale, pourra vérifier même si elle a tenu du 12 au 31 octobre 1881, les deux audiences prévues par la loi (art. 111, *ibid.* et 288 C. pén. vénéz.).

Tout ce que dit la défense au sujet de l'opposition des Roncayolo et des récusations de Fabiani, est sans conclusion au vu de l'arrêt de la haute cour fédérale du 8 décembre 1883, qui déclare que l'exécution des sentences françaises a été interrompue par des recours illégaux. Grâce à des retards contraires aux lois, Fabiani n'a pu mettre l'embargo sur les droits et actions de ses débiteurs. Il a fallu des années pour ne pas rendre une ordonnance d'exécution, qui devait être prononcée séance tenante.

Il n'était pas possible de rechercher, au préalable, en responsabilité le juge supérieur de Maracaibo et la cour suprême de l'Etat de Falcon, puisque, depuis près de quatre ans, Fabiani réclamait vainement l'*exequatur* d'un jugement inattaquable.

Suit un "état définitif" des preuves invoquées.

V. Le Gouvernement défendeur insiste, dans sa duplique, sur la circonstance que des négociations auxquelles le compromis a donné lieu et de ses termes mêmes il résulte que cet acte se réfère exclusivement aux faits postérieurs à l'arrêt du 6 juin 1882. L'arrêt du 11 novembre 1881 était parfaitement correct, puisque l'homologation de la sentence arbitrale n'était pas définitive, le 7 juin précédent, date du dépôt de la requête à fin d'*exequatur*.

En ce qui concerne le conflit de compétence, ni Fabiani lui-même, ni sa



partie adverse ne sont adressé à la cour de cassation ou à la haute cour fédérale, pour provoquer la solution du conflit et ils n'ont pas fourni le papier timbré nécessaire à la procédure, qui a été abandonnée.

La duplique pose en principe: qu'il n'y a pas eu de déni de justice, pas plus d'après les lois vénézuéliennes que d'après l'art. 506, C. proc. civ. fr., ou les lois allemande et suisse; que l'Etat n'est point responsable des actes de ses fonctionnaires de l'ordre judiciaire, si cette responsabilité n'est formellement consacrée par la loi, et que le droit vénézuélien ne la proclame pas, tant que les étrangers lésés n'ont pas porté leurs demandes d'indemnité devant la haute cour fédérale; que l'intervention diplomatique enfin est inadmissible, aussi longtemps que les recours prévus par les lois territoriales n'ont pas été épuisés.

VI. Par son ordonnance de juillet 1895, l'arbitre a invité le Gouvernement demandeur à produire divers documents et renseignements complémentaires, et prescrit l'audition de différents témoins invoqués en demande. De ces témoins, trois seulement, MM. Plumacher, R. Seijas et F. Osio ont pu être entendus, en présence des parties, par les soins de M. le représentant des Etats-Unis d'Amérique à Caracas; il a fallu près d'une année pour recueillir ces témoignages. Des quatre autres témoins, l'un est décédé au cours du procès, deux n'ont pu être atteints et le quatrième a refusé de répondre aux questions qui lui étaient posées, vu sa qualité d'ancien Président de l'un des deux Etats en cause.

Une partie des documents et renseignements complémentaires requis par l'ordonnance de juillet 1895 ont été fournis. Il n'a pas été pris de conclusions contre l'authenticité des pièces produites de part et d'autre; l'arbitre appréciera librement, en conséquence, leur valeur probante et leur force obligatoire. Les difficultés soulevées par l'apport même des preuves littérales ont été écartées, ainsi que cela ressort des déclarations des Gouvernements intéressés.

VII. La procédure a été déclarée close par l'arbitre le 21 octobre 1896.

#### B.—*En droit.*

##### I.

Il importe, en toute première ligne, de déterminer exactement l'objet du différend soumis à l'arbitrage. Aux termes du compromis du 24 février 1891, la question litigieuse est de savoir si, "d'après les lois du Vénézuéla, les principes généraux du droit des gens et la convention (du 26 novembre 1885) en vigueur entre les deux puissances contractantes, le Gouvernement vénézuélien est responsable des dommages que Fabiani dit avoir éprouvés pour dénégations de justice." Indépendamment même de l'intention des parties manifestée durant les négociations auxquelles a donné lieu la convention franco-vénézuélienne de 1885, il résulte à l'évidence du texte même du compromis et de l'ensemble des faits de la cause, que le Gouvernement défendeur est actionné uniquement à raison de la non-exécution, par les autorités vénézuéliennes, du jugement arbitral rendu à Marseille, en date du 15 décembre 1880, entre Antoine Fabiani, d'une part, Benoît et André Roncayolo, d'autre part. L'Etat demandeur semble même reconnaître que la dénégation de justice initiale est l'arrêt du 11 novembre 1881 (*Réplique*, p. 2); et, comme on la verra plus loin, il est inutile de rechercher s'il faut considérer plutôt l'arrêt du 11 novembre 1881 que celui

du 6 juin 1882, comme point de départ des responsabilités éventuelles encourues dans le sens du compromis.

D'un autre côté, la signification du mot "dénégation de justice" veut être précisée. Il convient d'entendre par là toute acte qui devra être envisagé comme une dénégation de justice, soit d'après les lois du Vénézuéla, soit d'après les principes généraux du droit des gens, soit d'après la convention du 26 novembre 1885, le compromis n'exigeant pas la concordance absolue de ces trois sources juridiques et des différences essentielles, ou même notables, n'existant d'ailleurs pas entre elles sur la matière.

La législation vénézuélienne ne fournit pas une définition directe de la dénégation de justice. Cependant le décret du 14 février 1873, sur les droits et devoirs des étrangers, dispose à cet égard, dans son art. 5, que les étrangers ont le droit de recourir à l'intervention diplomatique "lorsque, ayant épuisé les recours légaux devant les tribunaux compétents, il apparaît clairement qu'il y a eu déni de justice ou injustice notoire." Et les art. 282 et 288 du C. pén. vénéz., du 27 avril 1873, sont ainsi conçus: "Tout juge exécuter d'une sentence rendue exécutoire, qui refusera ouvertement de l'accomplir, sera puni de la même peine édictée par l'article précédent (amende ou détention), sans préjudice des poursuites auxquelles il y aura lieu de procéder de ce fait (282). Les magistrats d'un tribunal agrégé et autres juges qui n'expédieront pas les affaires avec la célérité prescrite par les lois, qui ne dicteront point les ordonnances et sentences dans les délais impartis par ces mêmes lois, qui prorogeront ou abrègeront indument les délais accordés aux parties, ou qui, d'une manière quelconque, retarderont la solution des procès civils ou criminels, seront punis de la suspension de l'emploi pendant une durée de un à six mois" (288).

On peut prétendre que le décret de 1873 ne saurait être invoqué dans ce cas, attendu, qu'entre la France et le Vénézuéla, la question du droit à l'intervention diplomatique a été réglée par la convention précitée de 1885. En vérité, un acte international a été substitué, sur ce point, à une loi purement nationale (cfr. art. 10 de la Const. vénéz. de 1881), et, bien que le compromis réserve l'application des lois vénézuéliennes, il ne vise que celles de ces lois opposables au Gouvernement demandeur; or, celle de 1873 a été modifiée, pour les ressortissants français, dans son art. 5 du moins, par une convention postérieure, obligatoire pour les deux Etats signataires du compromis.

S'il en est ainsi, la seule définition dont il est possible de tenir compte, en droit vénézuélien, est celle des art. 282 et 288 de Code pénal de 1873, qui assimilent à une dénégation de justice, tout fait, d'une *autorité judiciaire*, constituant un refus d'exécution d'une sentence rendue exécutoire, un retard illégal dans l'expédition des affaires, un défaut de prononcer les ordonnances et sentences dans les délais fixés, une prorogation ou une réduction indue des délais établis par la loi, ou encore tout retard quelconque apporté à la solution d'un procès. Les refus d'exécution, l'inobservation de délais péremptoires et les retards illégaux qui peuvent être reprochés aux juges dans l'exercice de leurs fonctions sont donc les trois ordres de faits caractéristique de la dénégation de justice, dans la législation du Vénézuéla.

La convention du 26 novembre 1885 porte ce qui suit, en son art. 5: "Afin d'éviter à l'avenir tout ce qui pourrait troubler leurs relations amicales,

les hautes parties contractantes conviennent : que leurs représentants diplomatiques n'interviendront point en matière de réclamations ou de plaintes des particuliers dans les affaires qui sont de la compétence de la justice civile ou pénale, conformément aux lois locales; à moins cependant qu'il ne s'agisse de déni de justice ou de retard dans la procédure contraire à la coutume ou à la loi, ou d'inexécution d'un arrêt définitif, ou enfin de la violation évidente des traités ou des règles du droit des gens, malgré l'accomplissement de toutes les formalités légales." On a paru, dans la demande tout au moins contester l'applicabilité de la dite convention au litige actuel, en invoquant le principe de la non-rétroactivité des lois et en rappelant que l'affaire Fabiani remonte à une période antérieure à la date du 26 novembre 1885. Mais, en l'espèce, ce n'est point Fabiani personnellement qui est partie au procès; l'arbitrage est conclu non pas entre lui, mais entre la République Française et le Venezuela. L'Etat demandeur est lié par l'acte international susmentionné, pour toutes les interventions diplomatiques à venir. Au demeurant, la convention est expressément reconnue applicable à la présente contestation par le compromis du 24 février 1891; elle fait loi entre les deux pays.

Une définition directe du déni de justice n'est point donnée par l'art. 5 de la Convention franco-vénézuélienne; le texte le signale seulement parmi les causes d'une intervention diplomatique, et on pourrait même croire qu'il le distingue en quelque sorte des autres causes d'intervention—retards, inexécution d'un arrêt définitif, etc.—ou qu'il l'en sépare nettement. Mais, sans qu'il soit besoin d'examiner si les parties ont employé, dans le compromis, l'expression de "dénégation de justice" comme équivalent exact du terme de déni de justice, qui est généralement adopté par la législation, la jurisprudence et la doctrine, il est permis d'affirmer que l'art. 5 ci-dessus assimile pleinement au déni de justice, quant à leurs effets, les retards illégaux de procédure, l'inexécution d'arrêts définitifs, les violations flagrantes du droit commises sous l'apparence de la légalité; dans tous ces cas, l'intervention diplomatique est déclarée admissible, pourvu qu'il s'agisse d'affaires rentrant dans "la compétence de la justice civile ou pénale." La condition, posée par le décret de 1873, de l'épuisement des pourvois légaux devant les tribunaux, n'est pas rappelée dans la Convention de 1885, et il serait excessif de dire que l'art. 5 *in fine* de cet acte international ("malgré l'accomplissement de toutes les formalités légales") se rapporte aux actions en responsabilité dirigées contre les autorités fautives; ces "formalités légales" s'entendent de celles à l'observation desquelles est subordonné l'accomplissement de l'acte judiciaire qui peut avoir déterminé un déni de justice, ou l'une des autres causes de l'intervention diplomatique; elles sont, par conséquent, antérieures au déni de justice lui-même.

En consultant les principes généraux du droit des gens sur le déni de justice, c'est-à-dire les règles communes à la plupart des législations ou enseignées par la doctrine, on arrive à décider que le déni de justice comprend non seulement le refus d'une autorité judiciaire d'exercer ses fonctions, et, notamment, de statuer sur les requêtes qui lui sont soumises, mais aussi les retards obstinés de sa part à prononcer ses sentences (cfr. arrêts du tribunal fédéral suisse des 11 juin 1880 et 7 mai 1884, dans le *Journal des Tribunaux*, année 1880, p. 801, et année 1884, p. 402; Code de proc. civ. français, art. 506 et 507; Garsonnet, *Traité théorique et pratique*

de procédure, vol. I, p. 225 et 229; Huc, *Commentaire théorique et pratique du Code civil*, vol. I, n° 180; Holtzendorff, *Rechtswörterbuch*, article "Rechtsverweigerung;" Wetzell, *System des ordentlichen Civilprocesses*, 5<sup>me</sup> éd., p. 815 et 463; Laband, *Das Staatsrecht des Deutschen Reichs*, vol. II, n° 242 et 243; Holtzendorff, *Handbuch des Völkerrechts*, vol. II, p. 74 et note 5 p. 75).

En réalité, les puissances compromettantes semblent avoir voulu attribuer aux mots "dénégations de justice" leur signification la plus étendue (*justitia denegata vel protracta*) et y faire rentrer tous les actes d'autorités judiciaires impliquant un refus direct ou déguisé de rendre la justice. Au lieu de reproduire textuellement les termes de la Convention de 1885, elles ont choisi une formule générale embrassant, dans les limites de ladite Convention, les griefs judiciaires de Fabiani contre le Vénézuéla, griefs qui, s'ils sont fondés, ont, en partie du moins, la portée de dénis de justice, tant d'après l'art. 5 de cet acte international, que d'après les lois vénézuéliennes et le droit des gens. Ce sont, effectivement, les réclamations de Fabiani, communiquées à son gouvernement, qui devaient inspirer la rédaction du compromis; et la mission de l'arbitre consiste précisément à décider si le Vénézuéla est "responsable des dommages que Fabiani dit avoir éprouvés pour dénégations de justice."

Il n'est pas douteux, qu'à l'époque où le compromis a été signé, les réclamations de Fabiani reposaient, entre autres, à la fois sur des dénis de justice *sensu stricto*, et sur d'autres faits, tels que les dénis de justice *sensu lato* indiqués dans la Convention de 1885. Et l'Etat défendeur, après avoir cité une note du 3 août 1887, où la légation française à Caracas, réduisant les prétentions de Fabiani à "ce qu'elles comportent en droit," tout en réservant "le surplus," et invoquant à l'appui de sa demande en dommages et intérêts le "refus d'exécution des sentences," ainsi que le défaut "d'exécution des sentences en temps utile," — l'Etat défendeur ajoute ceci: "Le Gouvernement du Vénézuéla trouva sans fondement les prétentions de Fabiani à réclamer une réparation, parce qu'il n'y avait pas eu déni de justice, ni lieu de recourir à l'intervention diplomatique" (*Défense*, p. 3). Ainsi, l'objet du différend et ses origines sont reconnus des parties; c'est pour refus d'exécution du jugement arbitral du 15 décembre 1880 que Fabiani possédait contre deux débiteurs domiciliés au Vénézuéla, ou pour défaut d'exécution par suite de l'admission de moyens illégaux, que la France a pris en mains les intérêts de son national. Le Gouvernement vénézuélien conteste le droit de son adversaire de l'actionner en responsabilité, non point parce qu'il n'envisagerait pas les faits judiciaires allégués par Fabiani, s'ils étaient vrais, comme emportant des dénis de justice, mais parce qu'il voit l'absence de dénis de justice dans l'inexactitude de ces faits ou dans la désertion de la procédure avant l'épuisement des recours légaux. Les parties, en s'appuyant, dans le traité d'arbitrage, sur la Convention de 1885, ont, quoiqu'elles ne parlassent au compromis que de "dénégations de justice," considéré que l'arbitre pouvait retenir comme des éléments du procès les faits rentrant dans le cadre de la convention prérapplée et constitutifs de dénis de justice en droit vénézuélien comme d'après le droit des gens: de l'avis même des intéressés, dès lors, et conformément aux textes applicables, les dénégations de justice, dans le sens du compromis, s'entendent de tous refus directs ou déguisés de juger, de tous retards de procédure illégaux et de toutes inexécutions d'arrêts définitifs, moyennant que ces faits concernent des affaires de la justice civile ou pénale,

soient imputables à des *autorités judiciaires* du Vénézuéla et se soient produits "malgré l'accomplissement de toutes les formalités légales" par la partie lésée.

En revanche, le Vénézuéla n'encourt aucune responsabilité, selon le compromis, à raison de faits étrangers aux autorités judiciaires de l'Etat défendeur. Les réclamations que le demande fonde sur des "faits du prince," qui sont, soit des changements de législation, soit des actes arbitraires du pouvoir exécutif, sont absolument sous traites à la décision de l'arbitre, qui élimine de la procédure tous les allégués et moyens de preuve y relatifs, en tant qu'il ne pourrait pas les retenir en vue d'établir d'autres faits concluants et connexes relatifs aux dénégations de justice.

II. Ce sont bien les dénégations de justice, commises au cours de la procédure d'exécution de la sentence arbitrale du 15 décembre 1880, et l'appréciation éventuelle de leurs conséquences pécuniaires, qui forment l'objet du litige actuel. Il est cependant nécessaire de relever encore une objection de la demande.

La situation judiciaire de Fabiani au Vénézuéla fut liquidée, d'abord, par la transaction du 31 janvier 1878. Après une série d'incidents Fabiani renonçait au bénéfice de cet acte et signait le compromis qui a donné naissance à la sentence arbitrale du 15 décembre 1880. La partie demanderesse a exposé qu'elle avait adhéré à ce compromis sous l'empire d'une force majeure et qu'il ne couvrait pas les dénégations de justice antérieures. Mais elle reconnaît sans détour (*demande*, p. 142 et s.) que Fabiani, qui aurait pu faire casser le compromis par les tribunaux français, préféra réserver l'avenir de son commerce au Vénézuéla en épuisant tous les moyens de conciliation; Fabiani se contentait ainsi de l'état de choses créé par l'acceptation de la juridiction arbitrale, et d'ailleurs, depuis ce moment, ses efforts judiciaires au Vénézuéla tendirent uniquement à l'exécution du jugement du 15 décembre 1880. Le motif tiré de la vis major, qui aurait affecté le compromis de 1880 et qui reculerait le point de départ des dénégations de justice comprises dans la présente instance, ne saurait donc être pris en considération. Des dénégations de justice, en vertu desquelles il serait possible de rechercher le Vénézuéla en responsabilité devant l'arbitre, n'ont pu se produire avant l'introduction de la procédure d'exécution de la sentence du 15 décembre 1880, soit avant le 7 juin 1881, date de la demande d'*exequatur* formée auprès de la haute cour fédérale.

Aussi l'arbitre n'a-t-il pas admis à la preuve, outre les "faits du prince," tous les faits étrangers à l'inexécution et aux effets de l'inexécution de la sentence rappelée.

III. La procédure d'exécution, introduite par Fabiani au Vénézuéla, remonte aux premiers jours du mois de juin 1881; interrompue à plusieurs reprises par des incidents divers, elle fut définitivement suspendue par l'arrêt de confit du 23 février 1884 et l'inaction du tribunal extraordinaire chargé par la loi de trancher la question de compétence que souleva la cour suprême de l'Etat de Falcon, en sorte, qu'à cette heure, la sentence arbitrale du 15 décembre 1880 n'est point exécutée. Les dénégations de justice, dont Fabiani peut avoir été victime, ont, en conséquence, dû se produire depuis le commencement de juin 1881 jusque dans les premiers mois de l'année 1884.

C'est par une requête à fin d'*exequatur* des 3 et 7 juin 1881 que Fabiani accomplit le premier acte de sa procédure; celle-ci n'était, suivant la

demande (p. 165), qu'une "simple formalité." Assurément, le compromis de 1880 stipulait que la sentence qui serait rendue par les arbitres deviendrait immédiatement exécutoire au Vénézuéla, sans qu'on pût admettre contre elle aucun recours. Mais les conventions des parties ne peuvent déroger à des règles d'ordre public, comme le sont celles relatives à l'exécution de jugements étrangers; cette matière se rattache à la souveraineté, et les principes qui la régissent sont du droit le plus strict (cfr. Calvo, *Le droit international théorique et pratique*, 5<sup>me</sup> éd., vol. III, p. 366). A d'autres égards, ce sont les lois territoriales qui déterminent exclusivement les formalités et conditions nécessaires pour obtenir l'*exequatur*. Ces formalités et conditions se trouvaient fixées, en l'espèce, par les art. 557 et 558 C. proc. civ. vénéz., et en particulier, par l'art. 558, ainsi conçu: "Pour que la sentence soit déclarée exécutoire, il faut citer le dixième jour la personne contre laquelle la sentence a été prononcée, et que les parties soient admises à discuter verbalement, en audience publique, ce qu'elles croient convenable pour la défense de leurs droits. La partie qui introduit l'affaire doit présenter la sentence en forme authentique." C'est à tort que la demande critique la procédure suivie par la haute cour fédérale, à laquelle s'était adressé Fabiani et qui a, de par l'art. 556 C. proc. civ. vénéz., "fonction de donner force exécutoire aux sentences rendues par des autorités étrangères;" la haute cour avait l'obligation de citer et d'entendre les adversaires de Fabiani, nonobstant les termes du compromis de 1880, et, ce faisant, elle ne s'est point rendue coupable d'une dénégation de justice.

Il n'est pas possible non plus de voir un déni de justice dans la décision sur incident, du 27 septembre 1881, car le fond de la contestation n'était pas abordé et il n'y a pas de contradiction insoluble entre elle et l'arrêt du 11 novembre, ni dans la circonstance que la haute cour n'a pas siégé, du 14 octobre 1881, jour de la clôture des débats, jusqu'au 31 même mois, l'art. 111 C. proc. civ. vénéz. ne prescrivant aux juges de rendre leurs sentences dans les deux jours à compter de celui où "sont terminés les exposés des parties," que "sous réserve de dispositions spéciales," auxquelles il a fallu recourir (*Annexe I*, de la défense, p. 20 et s.).

L'arrêt du 11 novembre 1881 ne constitue pas davantage un déni de justice, un refus déguisé de statuer. Fabiani s'adressait à la haute cour fédérale, pour qu'elle déclarât exécutoire au Vénézuéla l'ordonnance du président du tribunal de première instance de Marseille, du 21 décembre 1880, mise au pied de la sentence arbitrale du 15 même mois. Benoit et André Roncayolo contestaient la compétence de la cour et la valeur juridique de l'ordonnance du juge français. Au moment même où la procédure d'exécution fut introduite par Fabiani, celui-ci ne possédait, ni ne pouvait posséder, une copie authentique du jugement définitif dont il requérait l'exécution, puisque l'ordonnance du 21 décembre 1880, portée, par voie d'opposition devant le tribunal de première instance de Marseille puis confirmée le 1<sup>er</sup> avril 1881, mais déferée aussitôt après à l'instance supérieure, ne devenait définitive que par l'arrêt de la cour d'appel d'Aix du 25 juillet de cette dernière année.

Aussi longtemps que la question de la validité de l'ordonnance d'exécution du 21 décembre 1880 restait en suspens, la haute cour fédérale n'était pas tenue d'accorder l'*exequatur* requis. Il est vrai, qu'en "terminant ses plaidoiries," l'avocat de Fabiani a produit une expédition de

L'arrêt rendu par la cour d'Aix (*Annex I.*, de la défense, p. 18, 27, 32); mais le Gouvernement demandeur n'a mis sous les yeux de l'arbitre aucun texte légal qui pût faire considérer ce complément du dossier comme n'étant pas tardif, et Fabiani lui-même ne paraît pas y avoir attaché d'importance; effectivement, le 12 novembre 1881, il pria la haute cour fédérale de "donner exécution à l'arrêt de la cour d'appel d'Aix" du 25 juillet, après avoir été débouté, comme il le rappelle, des fins de sa requête tendant à obtenir l'*exequatur* de la sentence arbitrale déclarée exécutoire par l'ordonnance du 21 décembre 1880. Si l'arrêt d'Aix rentrait dans l'objet de la décision de la haute cour fédérale, du 11 novembre 1881, la nouvelle requête du lendemain aurait dû être forcément écartée, attendu qu'il y aurait eu *res judicata* sur ce point comme sur les autres; s'il n'y rentrait pas, la haute cour n'avait point, le 11 novembre 1881, l'obligation d'accorder l'*exequatur* à une sentence qui n'avait pas encore la valeur d'un jugement étranger passé en force de chose jugée. Partant, il est superflu de discuter le mérite des motifs invoqués à l'appui de l'arrêt précité de la haute cour fédérale, par la majorité des membres de celle-ci. Il ne pouvait, au reste, y avoir de dénégation de justice dans le cas particulier, spécialement en vertu de la Convention franco-vénézuélienne de 1885, qu'autant que toutes les formalités légales—soit, notamment, le dépôt régulier d'une sentence arbitrale munie d'une ordonnance d'exécution non frappée de recours—auraient été préalablement accomplies par Fabiani; ce qui n'a pas eu lieu, ainsi que les actes ultérieurs de la procédure permettent de la constater.

Il n'est pas indispensable de rechercher si l'arrêt de la Haute Cour fédérale, du 6 juin 1882, qui décréta l'exécution de l'arrêt de la cour d'appel d'Aix du 25 juillet 1881, à été rendu dans un sens favorable à Fabiani, parce qu'on redoutait, au Vénézuéla, que la question internationale ne fût posée. Cette décision n'implique évidemment aucune dénégation de justice; mais il convient d'examiner si ses effets n'ont pas été compromis d'une manière illicite par les autorités judiciaires de l'Etat défendeur.

Certains faits exposés en demande (p. 285 et s.) laissent supposer que l'arrêt du juin 1882 n'aurait donné qu'en apparence gain de cause à Fabiani et qu'on se réservait de rendre illusoire, à Maracaïbo, où elle devait être exécutée, la décision de la haute cour fédérale. Mais ces faits, que devaient prouver les déclarations de MM. Palacois et Rojas Paül, ne sont pas établis, l'un des témoins ayant refusé de répondre et l'autre n'ayant pu être atteint.

Quoi qu'il en soit, la série des dénégations de justice commence presque dès l'instant où Fabiani tenta d'obtenir, à Maracaïbo, l'exécution de la sentence arbitrale pourvue désormais d'une ordonnance d'*exequatur* en due forme; il sied de remarquer, avant tout, que la défense n'a pas même allégué que Fabiani n'eût point satisfait à toutes les "formalités légales" prévues par la Convention de 1885, pour arriver à l'exécution de ses sentences de la part des autorités judiciaires auxquelles il s'est adressé, et que celles-ci n'en ont pas signalé l'insuffisance ou l'absence.

L'existence de dénégations de justice, à compter de cette époque, résulte, entre autres, de l'arrêt de la haute cour fédérale, du 8 décembre 1883, reconnaissant que l'exécution a été arrêtée par "l'admission de recours illégaux" (*Annexe II*, de la défense, p. 187). Il est clair que l'incident soulevé à Maracaïbo par la partie adverse de Fabiani, à savoir que le juge-

ment à exécuter n'était pas la sentence arbitrale mais bien l'arrêt de la cour d'appel d'Aix, "était certainement absurde," comme le dit la défense (*Duplique*, p. 34); l'autorité judiciaire chargée de l'exécution aurait dû passer outre. Mais si André Roncayalo est débouté de son opposition, si le Tribunal de première instance au civil de Maracaibo refuse de se récuser, le même tribunal n'en accueille pas moins, avec effet simplement dévolutif d'abord, l'appel interjeté contre ses décisions, pour le recevoir à double effet, sur l'ordre du juge supérieur.

Or, l'opposition et le pourvoi de Roncayalo devaient être écartés sans examen, ainsi que la haute cour fédérale l'a proclamé dans son arrêt du 8 Décembre 1883. En permettant aux adversaires de Fabiani d'entraver sans droit l'exécution des sentences françaises, les autorités judiciaires du Vénézuéla ont commis à l'encontre de ce dernier des dénégations de justice, consacrées essentiellement par l'admission de l'appel des Roncayalo avec effet suspensif; il y a eu refus déguisé de statuer. Et cette opinion est fortifiée encore par le fait de la démission du juge Mendez; il est au moins vraisemblable que ce magistrat, qui avait ordonné les premières mesures d'exécution, se sera démis de ses fonctions pour sortir d'une situation fautive dans laquelle il ne voulait pas assumer plus longtemps une part de responsabilité.

Le défendeur reproche vivement à Fabiani d'avoir causé lui-même de graves retards, à raison des demandes de récusation qu'il a présentées contre le juge supérieur. Abstraction faite du bien fondé de l'une au moins des causes de récusation (*Annexe II*, de la défense, p. 61 et s.; cfr. art. 59, § 18, et art. 60 C. proc. civ. vénéz.), et du désir tout naturel que devait éprouver Fabiani de ne pas accepter la justice d'un magistrat qui, tout en se rendant l'auteur d'illégalités manifestes, s'obstinait à exercer son mandat, il suffit de rappeler que toute la procédure était arbitrairement arrêtée, contrairement aux vœux de Fabiani, par l'admission de moyens irrecevables; la faute originaire retombait, en tous cas, sur les autorités judiciaires qui n'avaient pas repoussé à l'origine de semblables moyens.

Des mois se passaient sans qu'il fût possible à Fabiani d'exercer les droits dérivant pour lui de la sentence arbitrale du 15 décembre 1880. Il sollicita, sur ces entrefaites, l'intervention du pouvoir exécutif, en se basant sur la § 17 de l'art. 13 de la Constitution, par lequel l'Etat est tenu "d'accomplir et de faire accomplir et exécuter . . . les décrets et ordres que . . . les tribunaux de la Fédération rendraient dans l'exercice de leurs attributions et de leurs facultés légales." Cette démarche, longuement critiquée dans la défense, était à la fois prudente et correcte, puisque aussi bien l'ordonnance d'*exequatur* de la haute cour fédérale n'était pas respectée, et qu'en pareil cas le Gouvernement a le devoir constitutionnel d'assurer l'administration de la justice. Si même la § 17 de l'art. 13 précité n'avait point cette portée et si l'on se refusait à voir, avec la demande, de la malveillance ou de l'incurie dans la résolution du Pouvoir exécutif du 9 juillet 1883, l'arrêt de la haute cour fédérale du 8 décembre suivant prescrit la continuation de la procédure d'exécution suspendue par des "recours illégaux," et décréta implicitement que toute la responsabilité des retards incombait aux autorités judiciaires qui étaient entrées en matière sur ces recours. En réalité, les retards considérables éprouvés par la procédure d'exécution sont bien le fait de juges, et si Fabiani a pu ou dû en



occasionner lui-même, il ne serait pas équitable de les lui imputer à faute, parce qu'il a tenté de modifier une situation contraire aux lois, qui était l'œuvre des tribunaux vénézuéliens.

Divers indices donnent à penser que le Gouvernement défendeur prenait ouvertement parti contre Fabiani, et que cette attitude pouvait inciter ou encourager l'autorité judiciaire, du moins dans des provinces éloignées de la capitale et soustraites au contrôle d'une opinion publique vigilante, à méconnaître les droits d'un demandeur étranger auquel des personnes influentes de l'Etat ne ménageaient point leur hostilité. Telle est l'approbation officielle du 21 août 1883 donnée à la cession, consentie par B. Roncayolo, du contrat de chemin de fer de la Ceiba, bien qu'il fût notoire au Vénézuéla que cette cession avait pour but de diminuer ou d'anéantir les gages d'un créancier; telle paraît être encore la modification adoptée par la législation de l'Etat Falcon aux art. 5 et 7 de la loi organique du pouvoir judiciaire, en janvier 1883; tel sera aussi le retrait du service du remorquage qui, dans les circonstances et à l'époque où il fut décidé, devait être interprété comme un acte de représailles dirigé contre Fabiani.

Une nouvelle dénégation de justice, du caractère le plus grave, allait se produire. Le juge de première instance de Maracaibo, se conformant à l'arrêt de la haute cour fédérale du 8 décembre 1883, avait ordonné la continuation de le procédure d'exécution, lorsque, le 9 février 1884, André Roncayolo demande que le dossier fût transmis à la cour suprême de l'Etat Falcon, qui, seule, était investie légalement de la juridiction en la matière. Cette requête fut repoussée, mais Roncayolo saisit directement la cour suprême; celle-ci, par arrêt du 23 du même mois, et d'office, "décida, en représentation du pouvoir judiciaire de l'Etat Falcon, de contester, comme elle le fait dès à présent, à la haute cour, par devant la cour de cassation, constituée en la forme susmentionnée, la compétence de connaître dans l'affaire de l'exécution de la sentence de la cour d'appel d'Aix, rendue exécutoire au Vénézuéla, dans la cause poursuivie par Antoine Fabiani contre André et Benoît Roncayolo."

Cet arrêt de conflit suspendait, une fois de plus, le cours de la procédure. Il se fondait sur l'art. 88 de la Constitution du 27 avril 1881, disposant que "tout ce qui n'est pas expressément attribué à la l'Administration générale de la Nation, par cette constitution, est de la compétence des Etats." L'autonomie judiciaire des Etats qui font partie de la Fédération vénézuélienne n'existe toutefois, d'après ce texte, qu'autant qu'elle n'est pas restreinte par la Charte du pays. Mais elle est limitée, notamment, par le § 17 déjà cité de l'art. 13 de la Constitution, par les art. 556 et suiv. du code de procédure civile, qui, bien que promulgués antérieurement, n'ont été abrogés—le gouvernement défendeur le reconnaît d'une manière implicite—ni formellement, ni virtuellement, par celle-ci, et par la loi constitutionnelle du 2 juin 1882 relative à l'organisation de la haute cour fédérale (cfr. Const. du 27 avril 1881, art. 80, chiffre 11).

C'est bien aussi la doctrine consacrée par la haute cour, dans ses deux arrêts du 6 juin 1882 et du 8 décembre 1883, ainsi que par le Gouvernement dans sa résolution du 9 juillet de cette dernière année. Assurément, une minorité des membres de la haute cour opina, et la défense a repris son argumentation, que la compétence de ce tribunal cessait dès le moment où il avait accordé l'*exequatur* aux sentences françaises. Cette théorie, cependant, est contredite par la loi organique du 2 juin 1882, qui

porte en son art. 8, chiffre 11, que la haute cour a mission de "provoquer la plus prompte administration de la justice—sans doute aussi de la justice qu'elle est appelée à prononcer—afin qu'elle soit strictement rendue par les juges et les tribunaux nationaux inférieurs" (cfr. ladite loi. art. 18, chiffres 4 et 5, art. 5, chiffre 9, combinés avec les art. 556 et suiv. C. proc. civ. vénéz.). Et le ministre de l'intérieur, par sa résolution du 9 juillet 1883, a expressément déclaré que "c'est à la haute cour fédérale qu'il appartient de faire observer ses dispositions." Au surplus, le § 17 de l'art 13 de la Constitution existe; comme les autorités judiciaires supérieures, le pouvoir exécutif était averti des illégalités commises et il n'a rien fait pour les empêcher, ni alors, ni plus tard, quoiqu'il eût le devoir d'assurer l'exécution des "décrets et ordres" émanés des "tribunaux de la Fédération."

La partie défenderesse prétend bien que, raisonner ainsi, c'est confondre l'*exequatur*, matière fédérale, avec l'exécution, matière de la juridiction de l'Etat requis. L'exécution est déferée, à la vérité, aux autorités judiciaires des divers Etats de la Fédération, mais, en tant que chargées de faire exécuter des sentences étrangères ensuite de décisions de la haute cour, elles se trouvent placées sous le contrôle de ce tribunal et elles en apparaissent comme les organes d'exécution. Accepter une thèse différente équivaldrait à convertir en décrets illusoires les ordonnances d'*exequatur* de la haute cour, qui n'aurait aucun moyen de leur prêter un effet quelconque et qui remplirait à cet égard des fonctions de pure forme. Il est plus logique, et il est dans l'esprit de la législation vénézuélienne, de considérer comme des juges et des tribunaux de la nation, placés sous la surveillance de la haute cour et agissant sur ses ordres (loi organique de 1882, art. 8, chiffre 11), les autorités judiciaires auxquelles est déléguée, dans les Etats, l'exécution des jugements étrangers (*ibid.* art. 18, chiffres 4 et 5).

La cour suprême de l'Etat Falcon, en soulevant un conflit de compétence dans une procédure dont la partie adverse de Fabiani entravait le cours, pour un motif que l'Etat défendeur qualifie de "certainement absurde," a commis une dénégation de justice dans le sens du compromis; en encourageant l'opposition mal fondée d'un débiteur, elle a, sinon déterminé un refus de statuer, du moins provoqué un retard injustifié, et après tant autres faits de même nature, la décision qu'elle a prise a dû fortifier en Fabiani la conviction que l'évidence de son droit ne le protégeait pas contre l'arbitraire des juges.

Fabiani, dit la défense, déserta la procédure; elle ajoute qu'il ne pouvait se plaindre de dénégations de justice aussi longtemps qu'il n'avait pas épuisé ses moyens d'action judiciaire au Venezuela, et provoqué, en particulier, une solution du conflit de compétence, ou invoqué les dispositions légales que permettent de faire condamner les magistrats fautifs à "rembourser les dommages et préjudices causés." Mais, d'abord, si Fabiani s'était prévalu de ces dispositions légales, il se serait heurté à l'objection que le tribunal extraordinaire, auquel est attribuée la connaissance des conflits de compétence et qui doit les trancher d'office, n'avait pas rendu sa décision; ce tribunal ne s'est d'ailleurs jamais réuni. Ensuite, Fabiani avait des raisons de croire que, s'il ne pouvait obtenir justice au Venezuela contre des débiteurs étrangers au pays, il l'obtiendrait moins encore contre des autorités judiciaires mêmes de l'Etat.

L'art. 16 de la loi organique de la cour de cassation, du 16 mai, 1882, règle la composition du Tribunal extraordinaire (cour de cassation et haute cour fédérale siégeant ensemble) qui avait à liquider le conflit de compétence. Les art. 54 et suiv. du Code de procédure civile prescrivent que "l'autorité supérieure que cela concerne procédera aussitôt qu'elle aura reçu les actes des *juges*, à la détermination de la compétence dans les vingt-quatre heures, de préférence à toute autre affaire," et que "l'arrêt sur la compétence sera prononcé *sans citation* ni mémoires." Conformément à ces textes, l'arrêt du 23 Février 1884 ordonne (*Annexe II*, de la défense, p. 338) que "le dossier sera envoyé à la cour de cassation et la présente décision notifiée à la haute cour fédérale *aux effets de la compétence provoquée*;" la cour de cassation a reçu le dossier le 24 mars 1884 (*ibid*, p. 379) et Fabiani devait admettre que l'arrêt du 23 Février avait été communiqué immédiatement à la Haute Cour fédérale. Il n'est nullement établi, ni même allégué, dans la défense, que le tribunal extraordinaire eût besoin, avant de pouvoir statuer, de renseignements complémentaires, qu'il est autorisé à réclamer en vertu de l'art. 55 du Code de procédure civile, ni qu'il se soit jamais réuni.

La procédure instituée par la loi du 16 mai 1882, et les art. 54 et suiv. du Code précité, qui sont applicables en l'espèce aux termes de l'art. 12 de la même loi, est une *procédure d'office*. La cour de cassation et la haute cour réunies devaient prononcer, dans les vingt-quatre heures à compter du 24 mars 1884, sur le conflit de compétence. En ne le faisant pas, elles se sont rendues coupables d'une dénégation de justice bien caractérisée.

Quant à l'argument du Gouvernement défendeur (*Duplique*, p. 50), d'après lequel les art. 54 et 55 du Code de procédure civile ne seraient pas applicables, la procédure étant tracée par l'art. 16 de la loi organique de la haute cour fédérale, elle est réfutée par l'arrêt même du 23 février 1884; et le dit art. 16 ne corrobore pas davantage cet argument que les dispositions transitoires de la loi dont il s'agit.

Il n'y a pas lieu d'attacher plus d'importance à un autre moyen avancé dans la duplique: le tribunal extraordinaire dont il a été question n'aurait eu l'obligation de juger, qu'une fois que les parties auraient fourni "le papier timbré nécessaire" (*ibid*, p. 50). La formalité du timbre exigée par l'art. 16 de la loi organique du 2 juin 1882, se rapporte uniquement aux affaires traitées devant la haute cour fédérale; elle dérive d'une prescription légale qui ne peut être étendue, par analogie, aux conflits de compétence déferés au Tribunal extraordinaire souvent mentionné, car l'analogie, exclue en principe dans une pareille matière, l'est formellement par la nature même de la procédure déterminée aux art. 54 et suiv. du Code de procédure civile; on ne concevrait point, à défaut de disposition contraire expresse, que les parties eussent à supporter, en acquittement de droits de timbre, les frais d'une instance qui est ouverte d'office, à raison du fait de juges qui se seraient déclarés faussement compétents ou dont la compétence aurait été contestée à tort par d'autres juges, et qui se déroule en dehors de toute participation des plaideurs. Fabiani, qui n'a pas été cité devant la cour suprême de l'Etat Falcon, qui ne pouvait ni ne devait être assigné devant le tribunal extraordinaire, était absolument étranger au conflit de compétence; ce tribunal avait l'obligation de statuer d'office, dans les vingt-quatre heures, sans que les parties eussent à accomplir quelque diligence ou formalité que ce fût.

En somme, Fabiani a été victime de plusieurs dénégations de justice, consommées par celle qu'implique l'inaction illégale de la cour de cassation et de la haute cour fédérale; cette dernière dénégation de justice seule suffisait à créer, au profit de Fabiani, le droit à l'intervention diplomatique et à lui assurer un recours en dommages et intérêts contre le Gouvernement défendeur, s'il doit être reconnu que celui-ci est responsable des fautes de ses autorités judiciaires et si Fabiani prouve qu'il a subi un préjudice de ce chef.

Dans les circonstances qui ont été exposées, l'intervention diplomatique était autorisée déjà par les termes formels de l'art. 5 de la Convention franco-vénézuélienne de 1885, et elle n'avait rien de contraire aux décisions de la doctrine (cfr. notamment, Holtzendorff, *Handbuch des Völkerrechts*, Vol. II, p. 74; Fiore, *Droit international codifié*, n° 339 et 340; voir aussi, Calvo, op. cit., Vol. I, n° 348; Pradier-Fodéré, *Traité de droit international public*, Vol. I, n° 402 et s.; Bluntschli, op. cit., n° 380). Il serait, effectivement, inadmissible d'exiger de Fabiani qu'il eût fait, en outre, constater ces dénégations de justice notoires par les tribunaux vénézuéliens compétents, lui qui, pendant des années, avait demandé en vain l'exécution d'une sentence inattaquable et pourvue de l'*exequatur* requis par les lois territoriales, bien que les autorités administratives et judiciaires supérieures de surveillance eussent été averties des illégalités commises. L'inexécution des sentences françaises, provoquée par les magistratures inférieures, tolérée par la haute cour fédérale et le Gouvernement, consacrée par le tribunal extraordinaire, enlevait à Fabiani la disposition d'une fortune considérable, l'entraînait dans des procès coûteux et sans issue, l'accablait finalement à la faillite et justifiait amplement une action internationale.

Il semble bien, à considérer la série des dénis de justice dont Fabiani avait le droit de se plaindre, et même l'une ou l'autre des décisions judiciaires qui lui donnaient momentanément gain de cause en apparence, que ses adversaires étaient protégés, au Vénézuéla, par des influences assez puissantes pour entraver l'activité normale des tribunaux du pays. Cette hypothèse repose, au surplus, sur trois faits précédemment rappelés; approbation officielle du 21 août 1883, modification des art. 5 et 7 de la loi organique du pouvoir judiciaire de l'Etat Falcon, et retrait du service du remorquage. Elle est fortifiée encore par d'autres circonstances, parmi lesquelles il suffira de mentionner les suivantes:

Deux des trois témoins dont les déclarations ont été recueillies pendant l'instruction de l'affaire, en présence des parties, n'ont fourni aucun renseignement de nature à faire douter de l'impartialité des tribunaux vénézuéliens; mais le troisième témoin, M. E.-H. Plumacher, consul des Etats-Unis d'Amérique à Maracaïbo, qui a bien été chargé par intérim du consulat de France dans cette ville et qui fut un temps le mandataire spécial de Fabiani, contre lequel toutefois aucune cause de suspicion n'a été relevée et qui est le ressortissant d'un Etat non impliqué dans le litige actuel, a déposé devant le ministre d'une nation neutre, chargé de l'entendre au nom de l'Arbitre: qu'il avait "l'impression", qu'en 1880, M. Guzman Blanco avait provoqué ou suggéré des démarches destinées à exercer une pression sur Fabiani, à l'occasion des démêlés de celui-ci avec les Roncayolo; qu'à ce moment, "M. Blanco était le pouvoir dans le pays"; qu'il "arriva des choses qui donnèrent lieu de douter l'impartialité des tribunaux vénézué-

liens"; qu'il avait "entendu de M. William Mollmann, précédemment employé dans la maison Roncayolo, ensuite employé du consulat américain, que M. Guzman Blanco et Benoit Roncayolo avaient des intérêts d'affaires ensemble et que M. Guzman Blanco aiderait Roncayolo en toute circonstance"; qu'au reste, "tout le monde à Maracaibo, savait cela, et qu'on disait couramment parmi les étrangers que M. Roncayolo gagnerait le procès, puisqu'il avait la protection de M. Guzman Blanco"; qu'il est, lui, témoin, "positivement convaincu que M. Fabiani n'était pas bien vu par les tribunaux et autorités". Ces déclarations sont très générales, il est vrai, et ne reposent pas sur des faits précis dont M. Plumacher aurait eu la perception directe; elles n'en sont pas moins l'opinion d'un observateur compétent et désintéressé, en sorte, qu'à ce titre, elles ne laissent pas d'avoir une réelle valeur.

Enfin, la conviction morale de l'Arbitre est que les dénégations de justice qui se sont produites à l'encontre de Fabiani ont un caractère exceptionnel de gravité, en ce qu'elles ne sont pas la suite de simples négligences ou d'interprétations erronées de textes légaux, mais apparaissent comme intentionnelles. Certes, en droit commun allemand comme en droit français (cfr. *Wetzell*, op. cit., 3<sup>me</sup> éd. § 43; *Holtzendorff*, *Rechtslexicon*, article "Prozessleitung"; von Bar, dans l'*Encyklopädie der Rechtswissenschaft* d'Holtzendorff, 3<sup>me</sup> éd., p. 779; *Garsonnet*, op. cit., Vol. II, § 211 et vol. I § 55 *in fine*; *Aubry et Rau*, 4<sup>me</sup> éd., Vol. VIII, § 749, n° 2), il est de principe que le juge ne doit prendre en considération que les faits articulés et les moyens de preuve invoqués par les parties. Cependant la doctrine moderne va plus loin (cfr. Kohler, *Gesammelte Beiträge zum Civilprozess*, p. 361 et s.; *Encyklopädie der Rechtswissenschaft*, d'Holtzendorff, l. c.), et l'on admet, entre autres, que les tribunaux ordinaires peuvent retenir des faits assez notoires pour qu'ils jugent inutile d'en administrer la preuve (C. proc. civ. allem. art. 264; cfr. *Wetzell*, op. cit., § 43 ad note 30, et § 20, ad notes 40 à 43). A plus forte raison en est-il ainsi, en matière d'arbitrage, surtout lorsque les parties n'ont point prescrit à l'arbitre la procédure à suivre (cfr. Wach, *Handbuch des deutschen Civilprocesses*, Vol. I, p. 73, et *Fuchsberger's Entscheidungen*, *Reichscivilprozessordnung*, Suppl.-Band, note 1 ad art. 866, et notes 4 et 6 ad art. 867 C. proc. civ. allem.)

L'Arbitre est investi d'un pouvoir discrétionnaire, limité seulement par l'obligation de se conformer aux principes essentiels de la procédure civile (Bluntschli, *Droit international codifié*, n° 495); il n'est pas forcé de s'en tenir aux allégués et moyens de preuve des parties, ni d'indiquer tous les éléments dans lesquels il puise sa conviction. La maxime des débats et le principe de la publicité, qui lient les juges permanents, et dont l'inobservation pourrait constituer un danger, ne lient pas dans la même mesure un arbitre, qui remplit des fonctions temporaires et qui est investi d'une magistrature de confiance.

Spécialement, lorsque le compromis est muet sur la question de la procédure à suivre, comme en l'espèce, on peut envisager que, dans l'intention même des parties, une grande liberté lui est laissée quant au choix des éléments dont il formera sa conviction. Cette conviction, dictée déjà par les résultats de l'administration de la preuve, a été renforcée, dans le sens marqué plus haut, par l'étude de documents que l'Arbitre s'est fait un devoir de consulter et d'apprécier au plus près de sa conscience.

Des dénégations de justice ayant été commises, à l'égard de Fabiani,

par des autorités judiciaires du Vénézuéla, dans les cas exposés et les circonstances relatées ci-dessus, il y a lieu d'examiner si l'Etat défendeur en est responsable, et, dans l'affirmative, quelle est l'étendue de sa responsabilité.

C'est une question très controversée, en droit public, que celle de savoir si un Etat répond du préjudice causé par ses agents, et spécialement par ses autorités judiciaires, à raison d'actes rentrant dans l'exercice de leurs fonctions.

En France, la doctrine et la jurisprudence sont divisées. La jurisprudence elle-même n'est pas unanime dans l'opinion, généralement consacrée toutefois, que les fautes commises par des fonctionnaires, dans les limites de leurs attributions légales, n'engagent pas la responsabilité de l'Etat, du moins d'une manière absolue et en l'absence de lois positives sur ce point (cfr. Fuzier-Herman, *Code civil annoté*, Vol. III, ad. art. 1382 et 1383, n° 767 et suiv.); mais la cour de cassation, par exemple, a reconnu, dans un arrêt du 1<sup>er</sup> avril 1845 (cfr. arrêts des 30 juillet et 16 août 1877, ainsi que *Pandectes françaises*, année 1896, IV<sup>me</sup> partie, p. 8, note 1, et *Laurent*, Vol. XX, n° 592), que l'Etat, représenté par les différentes branches de l'administration publique, est passible des condamnations auxquelles le dommage causé par le fait, la négligence, ou l'imprudence de ses agents, peut donner lieu. En tout cas, les fonctionnaires de l'ordre judiciaire n'étant pas tenus de leur faute légère (cfr. *Fuzier-Herman*, op. cit., Vol. III, ad. art. 1382 et 1383, n° 505 et suiv.; *Demolombe*, Vol. XXXI, n° 519; *Garsonnet*, op. cit., Vol. I, § 57, notes 12 et 18), la responsabilité de l'Etat ne pourrait s'étendre au-delà. La doctrine enseigne, de son côté, (*Aubry et Rau*, op. cit., Vol. IV, § 447, n° 2; *Demolombe*, Vol. XXXI, n° 63; *Baudry-Lacantinerie*, Vol. III, n° 1352), que l'Etat, représenté par les divers ministères et administrations publiques, doit, à l'égal de tout commettant, répondre du préjudice occasionné par ses employés ou agents dans l'exercice de leurs fonctions ou services, indépendamment de l'existence d'une loi spéciale, ou encore (cfr. *Laurent*, vol. XX, n° 419 et s., 444, 591 et s.), que la responsabilité de l'Etat est exclue, lorsque le fonctionnaire agit, non comme préposé et instrument de l'Etat, mais comme accomplissant la mission sociale qui lui est déléguée.

S'il règne, en France, une assez grande incertitude, notamment en ce qui concerne la responsabilité de l'Etat pour les dommages causés par ces fonctionnaires de l'ordre judiciaire, et si cette responsabilité paraît plutôt devoir être déniée en thèse générale, il n'en est pas autrement en Allemagne. La question y est résolue négativement par Loening (*Die Haftung des Staates*, etc., 92 et s.), affirmativement par H.-A. Zachariae (*Zeitschrift für die gesamte Staatswissenschaft*, année 1863, p. 582 et s.), par Stobbe (*Handbuch des deutschen Privatrechts*, vol. III, § 201, N° 6), par Gerber (*Grundzüge des deutschen Staatsrechts*, 2<sup>me</sup> éd., p. 207 et s.), par Bluntschli (op. cit., n° 467), par Windscheid (*Pandekten*, vol. II, § 470, note 4; cfr. les auteurs cités dans cette note), avec cette réserve que Windscheid, dans la sixième édition de son traité, expose, en modifiant son opinion première, que la responsabilité de l'Etat, ensuite de préjudices imputables à ses fonctionnaires, n'est pas un principe de droit commun en Allemagne, et que, d'après Holtzendorff (*Encyklopädie der Rechtswissenschaft*, p. 1113), cette responsabilité n'est admissible que dans certains cas. Mais la jurisprudence allemande, qui était plutôt favorable à la solution affirmative jusqu'en 1884, applique

aujourd'hui la théorie du tribunal de l'Empire, selon laquelle l'Etat n'est responsable qu'en vertu d'une disposition légale expresse (*Entscheidungen des Reichsgerichts in Zivilsachen*, vol. XI, p. 206; cfr. *Windscheid*, op. cit., vol. II, § 470, note 4).

Cette dernière théorie est adoptée par la jurisprudence et la doctrine suisses (cfr. Blumer-Morel, *Handbuch des schweizerischen Bundesstaatsrechts*, 2<sup>me</sup> éd., Vol. III. p. 230 et s.; Hafner, *Das schweizerische Obligationenrecht*, 2<sup>me</sup> éd., ad art. 64, note 4, ainsi que les arrêts du Tribunal fédéral cités dans ces deux ouvrages), tandis, qu'en Italie, la doctrine contraire semble prévaloir (cfr. *Fuzier-Herman*, op. cit., Vol. III. ad, art 1382 et 1383, n° 786). On peut ajouter que les auteurs, qui ont fait du droit international leur spécialité, reconnaissent que l'Etat est responsable des dénis de justice commis par ses autorités judiciaires, à tout le moins lorsque, duement informé ou averti, il n'aura rien entrepris, ni pour en empêcher les effets, ni pour en suspendre le cours (C. p. Holtzendorff, *Handbuch des Völkerrechts*, Vol. II. p. 74; Fiore, *Droit international codifié*, n°s 339 et 340; voir aussi, *Calvo*, op. cit., Vol. I. n° 348 *in fine*; Pradier-Fodéré, *Traité de droit international public*, Vol. I. n° 402 et s.; *Bluntschli*, op. cit., n° 340).

En droit vénézuélien, la question est résolue par la loi; elle l'est également, entre les parties en cause, par la Convention de 1885.

Le décret du 14 Février 1873, sur les indemnités à allouer aux étrangers, n'a pas été abrogé par l'acte international précité, en ce qui touche les conditions générales de la responsabilité de l'Etat pour des dommages occasionnés par ses fonctionnaires; il dispose, en son art. 1<sup>er</sup>: "Tous les individus, soit nationaux ou étrangers, qui intenteront contre la Nation des actions en dommages et intérêts ou expropriations, provenant d'actes d'employés de la Nation ou des Etats . . . devront s'en tenir aux formalités établies par la présente loi"—formalités qui, entre la France et le Vénézuéla, sont réglées aujourd'hui, en ce qui concerne notamment les préjudices dérivant de dénis de justice, par la Convention de 1885. L'art. 7 prévoit que "la Nation aura le droit de se faire rembourser par l'employé responsable, ou par l'Etat duquel relèverait le dit employé au moment de la faute, la somme que le Trésor national débourserait par suite de l'arrêt condamnatoire." Il ressort de ces textes que le Vénézuéla reconnaît expressément, en principe, sa responsabilité, pour des dommages imputables, soit à des fonctionnaires nationaux, soit à des fonctionnaires de l'un ou l'autre des Etats de la Fédération; cette responsabilité est directe, elle donne action contre l'Etat devant la Haute Cour fédérale. Quant aux fonctionnaires (*empleados*), la loi entend par là non point seulement les agents du pouvoir exécutif ou les préposés dans le sens de l'art. 1384 C. civ. f., mais toutes les autorités qui, investies d'une part de la puissance publique, représentent l'Etat et le personnifient. L'art. 9 du décret de 1873 le montre clairement: "Dans aucun cas, dit-il, on ne pourra prétendre que la Nation ou les Etats indemnisent à raison des dommages et intérêts ou expropriations qui n'auraient pas été causés par des autorités légitimes agissant en vertu de leur caractère public." Cette interprétation est confirmée, en outre, par le Code pénal du 27 Avril 1873, qui, après avoir traité, en ses art. 258 et 259, des infractions dont les juges peuvent se rendre coupables, ajoute, en son article 260: "Les employés publics d'une autre administration quelconque, etc."

En matière de responsabilité de l'Etat, il n'y a donc pas lieu d'établir de

distinction, en droit vénézuélien, entre les fonctionnaires de l'ordre judiciaire et ceux de l'ordre administratif, puisque la loi les assimile expressément les uns aux autres, et, qu'au même degré, bien que dans des sphères d'activité diverses, ils agissent au nom de l'Etat. Et, à un point de vue général, on ne voit pas pourquoi l'Etat répondrait, dans une mesure différente, des préjudices causés par ses fonctionnaires, selon que les auteurs du dommage seraient employés dans l'administration proprement dite ou dans la justice (cfr. *Stobbe*, op. cit., vol III, § 201, ad note 53; *H.-A. Zachariae*, op. cit., p. 637; *Windscheid*, op. cit., vol. I. § 59 *in fine*; *Blumer-Morel*, op. cit., vol. III, p. 230 et suiv.).

Un décret vénézuélien de même data que le précédent, sur les droits et les devoirs des étrangers, tout en disposant, en son art. 6, que "les étrangers n'ont le droit de demander des indemnités au Gouvernement" que, "dans les mêmes cas que les vénézuéliens"—ceci est toutefois modifié envers les Français par la Convention de 1885—proclame aussi, en principe, la responsabilité de l'Etat défendeur pour les actes de ses fonctionnaires. Il la reconnaît même expressément, à raison des faits illicites des autorités judiciaires, en réservant, dans son art. 5, la voie diplomatique pour les cas de "*déni de justice ou injustice notoire*," et la condition de l'épuisement préalable de toutes les voies légales de recours a été supprimée par la Convention de 1885 à l'égard des Français.

Cette responsabilité directe de l'Etat, édictée par la législation vénézuélienne, n'est pas contraire au droit des gens; elle est, de plus, affirmée dans la Convention du 26 Novembre 1885, qui permet l'intervention diplomatique et consacre implicitement la responsabilité de l'Etat pour toute la série des irrégularités judiciaires énumérés dans l'art. 5 de ce document.

L'Etat, d'autre part, ne saurait décliner sa responsabilité par la motif que les fautes de ses agents ou fonctionnaires ne présenteraient pas un certain caractère de gravité (voir, d'ailleurs, sub. V ci-après). L'art. 1 du décret du 14 Février 1873, sur les indemnités à allouer aux étrangers, est conçu en termes si généraux, que l'Etat y apparaît responsable exactement comme ses employés; et rien n'est plus rationnel, puisque l'acte dommageable est alors censé provenir de l'Etat lui-même (cfr. *H.-A. Zachariae*, op. cit., p. 632; *Stobbe*, op. cit., vol. III, § 201, note 53). Le déni de justice, sous quelque forme qu'il se produise, constitue un cas de responsabilité du fonctionnaire, partant, de l'Etat. Dès lors, Fabiani, victime de dénégations de justice dûment prouvées, pouvait actionner le Gouvernement défendeur, sans observer d'ailleurs l'art. 5 du décret du 14 Février 1873 concernant les devoirs et les droits des étrangers, qui pose comme condition de l'intervention diplomatique, l'épuisement préalable "des voies légales auprès des autorités compétentes" (cfr. Convention de 1885, art. 5); et la mesure de son action contre l'Etat est la même que contre les fonctionnaires fautifs.

V. Les dénégations de justice qu'a éprouvées Fabiani sont pour le moins des délits civils ou des quasi-délits. En droit moderne, l'auteur d'une faute aquilienne est, en principe, tenu de réparer tout le préjudice qui peut raisonnablement en être envisagé comme la conséquence directe ou indirecte (*damnum emergens et lucrum cessans*), certaines législations, comme celles de la France et de l'Allemagne, ne faisant pas dépendre la quotité des dommages et intérêts de la gravité de la faute, d'autres, comme le Code civil autrichien et le Code fédéral des obligations, n'accordant la



réparation intégrale qu'en cas de dol ou de faute lourde. Au demeurant, les dommages et intérêts ne doivent pas être la source d'un profit pour celui qui les obtient (cfr. *Fuzier-Herman*, op. cit., vol. III, ad. art. 1382 et 1383, n<sup>os</sup> 1065 et suiv.; *Aubry et Rau*, vol. IV, § 445 et 446; *Dolombe*, vol. XXXI, n<sup>os</sup> 685 et suiv.; *Laurent*, vol. XX, n<sup>o</sup> 529; *Zachariae*, *Handbuch des französischen Civilrechts*, 7<sup>me</sup> édit., § 443 et 445; *Windscheid*, op. cit., 6<sup>me</sup> ed., vol. II, § 451, n<sup>o</sup> 1, 455, No. 5, 258, notes 10 et suiv.; *Stobbe*, op. cit., vol. III, § 200, n<sup>o</sup> 6; *Holtzendorff Rechtslexicon*, article "Schadensersatz;" *Holtzendorff*, *Handbuch des Völkerrechts*, vol. II, p. 74, 75; *Motice* du projet du Code civil allemand, vol. II, p. 724 et suiv.; *Schneider et Fick*, *Das schweizerische Obligationenrecht*, 3<sup>me</sup> ed., notes ad. art. 50 et 51 C. Féd. des obl.; *Hafner*, op. cit., 2<sup>me</sup> ed., notes ad. art. 50 et 51 C. féd. des obl.; *Rossel*, *Manuel du droit fédéral des obligations*, p. 88 et suiv.)

En ce qui regarde spécialement les fonctionnaires de l'ordre judiciaire, leur responsabilité embrasse, en droit commun allemand, tout le dommage résultant de leur dol ou d'une faute lourde de leur part; le point de savoir si cette responsabilité existe également dans les cas de faute légère est controversé, mais la solution affirmative prévaut (cfr. *Windscheid*, op. cit., vol. II, 470; *Dernburg*, *Pandekten*, 3<sup>me</sup> ed., vol. II, § 135; *Wetzell*, op. cit., § 36, note 14). La responsabilité du pouvoir judiciaire est aussi admise en France (C. proc. civ. fr., art. 505; cfr. *Garsonnet*, op. cit., vol. I, § 54; *Laurent*, op. cit., vol. XX, n<sup>o</sup> 447), mais, comme il a été expliqué plus haut, elle n'est pas entraînée par une faute légère.

Au Vénézuéla, ce sont les art. 341, 255 à 259, 282, 288, 297 et 339 du Code pénal du 27 avril 1873 qui régissent, d'une manière spéciale, la matière de la responsabilité civile d'une autorité judiciaire. Les juges peuvent être actionnés en dommages et intérêts, non seulement ensuite de leur dol ou de leurs fautes lourdes, mais encore pour des fautes légères, et le texte de l'art. 341 semble indiquer que la réparation doit être complète dans tous les cas. Il n'est pas besoin, au reste, d'appuyer sur cette dernière question, attendu que les dénégations de justice dont se plaint Fabiani procèdent, à tout le moins, de fautes lourdes et que, dans ces circonstances, le préjudice à réparer s'entend, et du *damnum emergens*, et du *luorum cessans*; il comporte, en outre, le tort moral comme le dommage matériel (*Laurent*, vol. XX, n<sup>os</sup> 393, 395 et suiv.; *Aubry et Rau*, vol. IV, § 445; *Huc*, op. cit., VIII, n<sup>o</sup> 413; *Demolombe*, vol. XXXI, n<sup>o</sup> 672; Code féd. des oblig., art. 55 et les ouvrages cités de *Schneider et Fick*, *Hafner et Rossel*; C. civ. autr. art. 1329, 1330). Relativement au dommage indirect cependant et à la nécessité d'établir un rapport de cause à effet entre le fait illicite et le dommage prétendu, le demandeur prouvera que, soit en consultant le cours ordinaire des choses, soit en s'attachant aux affaires de la partie lésée ou aux dispositions prises par elle, il est probable—non pas seulement possible—que celle-ci aurait réalisé tel ou tel profit si le fait illicite ne s'était pas produit, la preuve étant d'ailleurs soumise à des conditions moins strictes en cas de faute lourde ou de dol et le juge conservant une entière liberté d'appréciation.

Si l'on doit décider que le gouvernement défendeur est responsable des conséquences des dénégations de justice imputables aux autorités judiciaires vénézuéliennes envers Fabiani, il reste à déterminer l'étendue de ces conséquences en application des principes exposés plus haut.

Le dommage matériel direct subi par Fabiani comprend les valeurs non

recouvrées et les biens perdus dont il serait rentré en possession, si la sentence arbitrale du 15 décembre 1880 avait pu être exécutée contre les Roncayolo; il comprend également, en principe, les frais de la procédure d'exécution (voir sub. VI., litt. a, chiffre 3). Fabiani n'eût-il pas été victime de dénis de justice, et l'exécution de la dite sentence n'eût-elle pas été entravée, puis, rendue illusoire, il aurait pu obtenir paiement de toutes les condamnations prononcées contre ses débiteurs. Effectivement, B. et A. Roncayolo étaient solvables jusqu'à concurrence au moins des restitutions diverses ordonnées par le jugement du 15 décembre 1880. Ce fait découle déjà de ce que le Gouvernement Vénézuélien n'a jamais allégué même que les réclamations de Fabiani fussent irrecevables contre les Roncayolo, et qu'il s'est borné à contester l'existence des dénégations de justice, ainsi que la responsabilité de l'Etat. En outre, B. Roncayolo, de la vue de la partie défenderesse, a été agréé par les pouvoirs publics du Vénézuéla, comme concessionnaire d'importantes entreprises, et il était fermier de la douane de la Ceiba. André Roncayolo a pu, lui, pendant plus de trois ans, tant en son nom personnel que comme fondé de procuration de son père, faire les frais de nombreuses et coûteuses oppositions à l'exécution de la sentence arbitrale, choisir ses avocats parmi les juriconsultes notoirement les plus renommés du pays, sans compter qu'il s'était enrichi d'une somme de plus d'un demi-million de francs au détriment de Fabiani. Et c'est vraisemblablement pour mettre à l'abri des poursuites de leur créancier, les droits et intérêts considérables qu'ils avaient au Vénézuéla, que les adversaires de Fabiani ont empêché avec tant d'acharnement l'exécution de la sentence du 15 décembre 1880. La solvabilité de B. et A. Roncayolo, partant, la recouvrabilité des valeurs au remboursement desquelles ils avaient été condamnés, ne sauraient être sérieusement mises en doute, d'autant plus que, comme on vient de le dire, le Vénézuéla ne les a point déniées.

En dehors du dommage matériel direct, Fabiani a éprouvé un tort matériel et surtout moral très grave, en ce que les dénégations de justice ont porté à tous égards une profonde atteinte à sa situation personnelle et ont même été la cause de la faillite prononcée contre lui au Vénézuéla (voir sub. VI, litt. a, chiffre 6 ci-après).

Le dommage indirect enfin a sa source dans le fait que les sommes payables par les Roncayolo en vertu de la sentence arbitrale, ont été soustraites au créancier pendant un grand nombre d'années et qu'il n'a pu ni les employer dans son commerce, ni les faire fructifier d'une manière quelconque; il ne s'agit pas ici de bénéfices ou de pertes purement hypothétiques, dans lesquels certains publicistes (*Calvo*, op. cit., IV, 477) se refusent à voir "la matière d'une action pécuniaire de gouvernement à gouvernement," mais d'un manque à gagner dont les éléments reposent sur des faits concluants, et il serait souverainement contraire à l'équité et à la justice de n'en point tenir compte dans le présent procès (voir sub. VI, litt. b). Et maintenant, deux éventualités pouvaient se présenter; ou bien, les débiteurs de Fabiani s'acquittaient envers lui, ou bien, soit à l'amiable, soit par voie d'exécution, il se substituait à tous les droits de concessions, de douanes et autres qu'ils possédaient au Vénézuéla. Entre ces deux hypothèses, plausibles l'une et l'autre, il faut nécessairement choisir celle qui est la moins défavorable à l'Etat défendeur et qui est aussi la plus

admissible d'après le cours ordinaire des choses, c'est-à-dire l'hypothèse du paiement. Ceci d'autant plus qu'il n'a été ni offert, ni administré aucune preuve tendant à établir que cette hypothèse de la solution la plus normale du différend Fabiani-Roncalolo ne se serait point réalisée; il résulte même de l'exposé du gouvernement demandeur que les débiteurs de Fabiani avaient un intérêt majeur, s'ils étaient contraints d'exécuter la sentence arbitrale, à se libérer purement et simplement entre ses mains, plutôt qu'à se laisser enlever des droits d'une valeur bien supérieure à celle des condamnations prononcées—sans parler même des obstacles auxquels se serait heurté sans doute le transfert de tout ou partie de ces droits à Fabiani, et sans apprécier l'efficacité des sûretés réelles obtenues au cours de la procédure d'exécution.

La question du mode de paiement de l'indemnité a été discutée dans la demande, mais elle n'est point litigieuse; le compromis l'a réglée d'une manière obligatoire pur les parties et pour l'Arbitre.

VI. La liquidation, d'après les principes ci-dessus, de l'état de dommages et intérêts présenté par le Gouvernement demandeur fournit les résultats suivants:

*a. Dommage direct et tort moral.*

(1) La sentence arbitrale fixait à la somme de 538,359 fr. .07, valeur au 31 janvier 1878, le débit de André Roncalolo envers Fabiani. Ce poste est réduit, en capital, d'après la demande à.....		Francs. 429,668. 10
Il y a lieu de tenir compta d'un versement de .....		5,490. 55
Reste .....		424,177. 55

(2) Outre cette somme, due par A. Roncalolo, la sentence arbitrale confère à Fabiani le droit de réclamer "tous les produits, sans aucune exception et sans aucune réserve, donnés par l'entreprise du remorquage depuis le 30 novembre 1877, y compris les bénéfices du pilotage," dès la même époque, en tant que ces profits auraient été encaissés par B. ou A. Roncalolo; les autres condamnations dérivant de la sentence du 15 décembre 1880, ont été exécutées, au moins dans une certaine mesure, puisque Fabiani a repris, dès le mois de juillet 1882, soit avant le début des dénégations de justice, le service du pilotage et du remorquage, et que des preuves positives concernant les effets de l'inexécution de ces autres condamnations font défaut dans la procédure.

Du chef du dispositif précité de la sentence arbitrale, la demande porte au compte de "liquidation des sentences," en capital:

	Francs.
Recettes du pilotage du 1 <sup>er</sup> décembre 1877 au 30 décembre 1878..	16,000. 00
Recettes du pilotage du 1 <sup>er</sup> décembre 1878 au 30 décembre 1879..	16,000. 00
Recettes du pilotage du 1 <sup>er</sup> décembre 1879 au 30 décembre 1880..	16,000. 00
Recettes du pilotage du 1 <sup>er</sup> décembre 1880 au 30 décembre 1881..	12,500. 00
Recettes du pilotage du 1 <sup>er</sup> décembre 1881 au 15 juillet 1882.....	7,812. 45
Total.....	68,312. 45

Le Gouvernement défendeur n'a ni contesté le bien fondé de cette dette, provenant des encaissements faits sans droit par la partie adverse de Fabiani, ni critiqué ces chiffres qui ne paraissent pas exagérés.

Il en est de même pour les restitutions qui se rapportent au remorquage; elles sont ainsi formulées dans la demande, en capital:

	France.
Produit net de l'année 1880.....	100,000.00
Produit net de l'année 1881.....	100,000.00
Produit du 1 <sup>er</sup> janvier au 15 juillet 1882 .....	54,165.51
<b>Total.....</b>	<b>254,165.51</b>

Le produit net évalué annuellement à 100,000 francs n'est qu'approximatif; mais ce chiffre, qui n'a pas été contesté dans la défense, peut être admis au vu des documents produits. Quant aux "abus de confiance" et "détournements" des Roncayolo, qui ne visent pas directement le pilotage ou le remorquage, ils ne sont pas compris dans la sentence arbitrale, ni, par conséquent, dans le compromis de 1891.

(3) Il y a lieu d'ajouter au compte de "liquidation des sentences" les frais importants occasionnés par la procédure d'exécution depuis le 15 décembre 1880, frais que le Gouvernement demandeur fait figurer sous diverses rubriques de son état de dommages et intérêts; les autres frais judiciaires réclamés ne peuvent rentrer dans l'indemnité à fixer par l'Arbitre. Ce poste embrasse les frais d'enregistrement de la sentence arbitrale, les frais de justice et de partie tant de la procédure devant les tribunaux français que devant les tribunaux vénézuéliens, soit que la party adverse de Fabiani ait l'obligation de les rembourser, soit qu'ils aient été causés inutilement à ce dernier.

Une somme, intérêts compris, de ..... fr.. 200,000 ne semble pas excessive, si l'on tient compte, entre autres, des nombreux et coûteux déplacements que la sauvegarde de ses droits a imposés à Fabiani, et même si l'on porte en déduction les frais qui peuvent être envisagés comme ayant été faits sans motifs légitimes.

Toutes les autres réclamations de l'état consacré à "la liquidation des sentences" sont étrangères au litige actuel; c'est le cas des "abus de confiance" et "détournements" dont il a été parlé plus haut, ainsi que des "annuités dotales" en vertu du contrat de mariage du 20 avril 1867, de la perte éprouvée sur la vente des marchandises d'après la transaction du 31 janvier 1878, etc. Ces sommes n'étant pas comprises dans la sentence arbitrale n'ont pu provoquer, de la part des tribunaux vénézuéliens, des dénégations de justice dont le Gouvernement défendeur serait responsable aux termes du compromis de 1891.

La question des intérêts est réservée (voir sub. litt. b ci-après).

(4) Parmi les réclamations figurant dans l'état B. dommages et intérêts, les seules qui puissent être prises en considération, dans l'espèce, sont celles mentionnées sous chiffres 11, 12 et 19 de l'exposé des faits qui précède; or elles sont entrées en ligne de compte, déjà lors de la fixation (voir sub. 3) des frais d'exécution de la sentence arbitrale. Les autres indemnités n'ont pas leur source dans ladite sentence, ni, par conséquent, dans son défaut d'exécution ensuite de dénégations de justice imputables aux tribunaux du Vénézuéla; il est superflu, dans ces conditions, de s'occuper des déductions consenties dans l'état B., attendu qu'elles ont trait à des postes éliminés par l'Arbitre.

(5) L'état C. se réfère au service du remorquage, et les dommages et intérêts qu'il comporte ont leur origine dans le retrait de ce service en

1884. Cette question a été tranchée à propos de celle des "faits du prince;" sans discuter même le point de savoir si le Gouvernement défendeur n'était pas en droit de dénoncer le contrat du 7 décembre 1874, il est évident que les gains dont Fabiani prétend avoir été frustré par cet acte, ne lui ont pas été enlevés à raison de dénégations de justice qui, seules, peuvent engager la responsabilité du Vénézuéla dans l'instance actuelle. Il s'agit ici précisément d'un de ces "faits du prince," sur la légitimité et les effets duquel l'Arbitre n'a pas à se prononcer; il ne lui était permis de l'apprécier que comme un indice des dispositions de l'autorité vénézuélienne envers Fabiani (voir sub. III. ci-devant).

(6) Un tort considérable, matériel et surtout moral (état E.), a été causé à Fabiani par sa déclaration de faillite au Vénézuéla, la fermeture de ses établissements commerciaux à Maracaibo, les embarras financiers dans lesquels il a été fatalement plongé et l'abandon forcé de ses entreprises. Ce dommage peut être envisagé comme la conséquence immédiate des dénégations de justice, puisque aussi bien Fabiani a été mis en faillite à Maracaibo pour défaut de paiement de sommes inférieures de beaucoup à celles que l'exécution de la sentence arbitrale lui aurait fait recouvrer. Le Gouvernement défendeur ne conteste pas que Fabiani possédait des maisons prospères au Vénézuéla et à Marseille, du moins avant les démêlés judiciaires dont est né le présent litige; et les motifs de la sentence arbitrale, ainsi que d'autres éléments de la cause, montrent que le ressortissant français, dont l'Etat demandeur a pris les intérêts en mains, était un négociant sérieux et honnête, auquel le recouvrement de ce que les Roncayolo lui devaient aurait permis d'escompter largement l'avenir. Sa faillite, déterminée par les dénégations de justice souvent rappelés, l'a profondément atteint, tant dans sa situation économique que dans sa personnalité tout entière, si bien que l'allocation d'une indemnité proportionnée au dommage subi s'impose de ce chef. Au reste, Fabiani, grâce à ses connaissances, à son activité, à ses moyens d'action, ne pouvait manquer, dans des conditions normales, d'accroître encore la considération et le crédit dont il jouissait, de donner à ses entreprises un plus grand essor, et, très probablement, de faire, en sus du gain perdu et dont il sera parlé ci-après, d'autres bénéfices par l'exploitation d'autres sources de revenus; par la faute des autorités judiciaires du Vénézuéla, il a perdu tout ensemble ses biens et son honneur, et il a traversé de très pénibles épreuves. Ce sont là des circonstances exceptionnelles, dont il serait injuste de méconnaître la gravité et d'écarter les conséquences dommageables, en invoquant le caractère international de la contestation actuelle.

Des renseignements précis font nécessairement défaut, sur certains points, pour établir avec une exactitude absolue le montant de la réparation qui est légitimement due à Fabiani, dans les limites de l'état E de la demande. L'Arbitre, appréciant librement les faits de la cause, évalue à fr. 1,800,000 le chiffre des dommages et intérêts représentant le préjudice éprouvé, indépendamment de celui reconnu sous litt. b.

*b. Dommage indirect.*

(1) Les dommages et intérêts réclamés dans l'état D correspondent aux sacrifices faits pour le maintien de l'industrie de Fabiani et au gain dont il a été frustré. La non-exécution de la sentence arbitrale, non-exécution provoquée par des denis de justice, a causé à Fabiani un préjudice indirect fixé dans la demande à la somme de 4,200,000 francs; mais il importe de ne

pas confondre ce dommage avec celui dont il vient d'être aplér, sous litt. a, chiffre 6.

Aussi bien, il y a lieu d'admettre ici, à titre de compensation, uniquement l'équivalent du dommage qui peut être considéré comme une suite de l'impossibilité dans laquelle s'est trouvé Fabiani, à raison de l'inexécution du jugement du 15 décembre 1880, de faire fructifier les capitaux importants qui lui étaient dus et qu'il aurait recouvrés. Le moyen le plus sûr d'arriver à un évaluation certaine, eût été de consulter les livres de la maison Fabiani et de vérifier jusqu'à quel point ses bénéfices avaient successivement diminué par l'effet du refus déguisé, mais persistant, des autorités vénézuéliennes, de procéder ou de laisser procéder à l'exécution de la sentence arbitrale. Ces livres n'ont pas été produits, et, quoique le défaut de production de ces documents paraîsse excusable, les indications fournies dans l'état D ne constituent pas des justifications suffisantes de toute l'indemnité réclamée. L'existence d'un dommage indirect n'en est pas moins indubitable. Ce préjudice consiste essentiellement, non pas dans les sacrifices, prouvés d'une manière incomplète, que Fabiani aurait faits pour le maintien de son industrie et dans des profits plus ou moins probables, mais dans la circonstance que les sommes dues en vertu de la sentence arbitrale sont demeurées inproductives pendant nombre d'années, de par les dénégations de justice commises à son encontre au Vénézuéla.

Dans la demande, on a ajouté constamment au capital des réclamations formulées, les intérêts composés qui rentrent plutôt dans les indemnités à allouer pour dommage indirect. Il convient, à ce propos, de faire observer que les arguments invoqués par le Gouvernement défendeur (*Défense*, p. 97 et suiv.) contre la prétention de la partie adverse d'exiger des intérêts ne sont nullement fondés; la renonciation que l'on oppose au Gouvernement de la République française ne concerne pas la présente contestation et ne saurait être entendue au-delà de ses termes; de plus, les considérations juridiques développées à l'appui de la thèse de l'Etat vénézuélien ne sont pas concluantes, pour les motifs précédemment exposés et qui montrent que la mesure de la responsabilité de l'Etat est adéquate à celle de la responsabilité des autorités fautives elles-mêmes.

S'il en est ainsi, on doit reconnaître que Fabiani aurait pu faire fructifier, dans ses entreprises, les intérêts simples du montant des condamnations de la sentence arbitrale, dans l'éventualité où il n'aurait pas été victime de dénégations de justice. La capitalisation d'intérêts est autorisée en matière de comptes-courants et d'opérations analogues, parce que le législateur présume que, dans le commerce, l'argent ne reste pas improductif (cfr. art. 335, C. féd. des oblig. et *Laurent*, op. cit., Vol. XVI, n° 348). Mais Fabiani n'a droit à des intérêts composés que pour les réclamations admises sous litt. a, chiffres 1 et 2, qui s'élèvent à la somme totale de 746,656 fr. 51, car il n'en saurait être question, ni à l'égard des 200,000 francs alloués pour frais judiciaires, ni à l'égard de l'indemnité ferme de 1,800,000 francs accordée sous litt. a, chiffre 6. Les intérêts composés de la somme de 746,656 fr. 55 ne représentent toutefois pas, dans l'opinion de l'Arbitre, le gain intégral dont Fabiani a été frustré par le non-recouvrement des sommes comprises dans la sentence arbitrale. Si Fabiani avait pu tirer parti de ces sommes et les employer dans son négoce, il est vraisemblable qu'il aurait fait des bénéfices supérieurs aux intérêts composés de

ce capital pendant le laps de temps durant lequel il serait autorisé à les porter en compte. Ainsi qu'il résulte de circonstances déjà relatées, il avait des maisons de commerce prospères, son crédit était bien établi, ses ressources étaient considérables, toutes ses entreprises paraissaient assurées d'un rapport exceptionnellement élevé; les dénégations de justice dont il a été la victime lui ont causé les pertes très graves qui viennent d'être rappelées. Ici, de nouveau, l'Arbitre doit apprécier librement, suivant la conviction qu'il a pu se former, et il juge équitable d'évaluer à Fr. 1,500,000 le dommage indirect subi par Fabiani, en tenant compte de la réalisation de l'hypothèque de 120,000 francs.

(2) Sur les préjudices commerciaux de Fabiani viendrait se greffer, suivant la demande, le dommage éprouvé dans l'affaire du chemin de fer de la Ceiba. Comme le montrent les considérations développées sous chiffre *V in fine*, il n'est point établi que B. et A. Roncayolo ne se seraient pas libérés, afin précisément d'arrêter toute procédure dirigée contre des droits et actions d'une grande valeur. Il n'est pas prouvé davantage que le transfert de ces droits et actions, à défaut même de paiement, se serait nécessairement, et pour leur totalité, effectué au profit de Fabiani. L'hypothèque sur laquelle repose cette réclamation de 24,000,000 de francs ayant été écartée, il convient de faire complètement abstraction de l'indemnité qui s'y rapporte.

c. En ce qui concerne *les frais de la présente instance*, l'Arbitre, constatant que les conclusions de la demande sont adjugées en principe, mais que l'exagération des réclamations formulées a entraîné des dépens inutiles, met les frais du Gouvernement demandeur, liquidés à la somme de Fr. 100,000—à la charge du Gouvernement défendeur et compense entre les parties les dépens de l'arbitrage.

VII. De ce qui précède, il résulte que le chiffre intégral de l'indemnité allouée s'établit comme suit:

	Francs.
1. Débit A. Roncayolo .....	424, 177. 55
2. Recettes du pilotage .....	68, 312. 45
3. Recettes du remorquage .....	254, 166. 51
4. Frais d'exécution .....	200, 000. 00
5. Dommage causé par la faillite .....	1, 800, 000. 00
6. Dommage indirect .....	1, 500, 000. 00
7. Frais du demandeur .....	100, 000. 00
En tout .....	4, 346, 656. 51

Par ces motifs.

#### PRONONCE:

Le Gouvernement des Etats-Unis du Vénézuéla paiera à Fabiani, à titre d'indemnité, dans les termes du compromis du 24 Février 1891, tous frais compris, la somme totale de quatre millions trois cent quarante-six mille cinquante-six francs cinquante et un centimes (Fr. 4, 346, 656. 51), avec intérêts à cinq pour cent l'an dès la date de la présente sentence.

Les dépens de l'arbitrage sont compensés entre les parties.

Ainsi fait à Berne, le trente Décembre 1896.

A. LACHENAL,  
Président de la Confédération suisse.

**Germany and Chile.**—Under a convention of August 23, 1884, a mixed commission was provided for to adjust the claims of German subjects against Chile growing out of the war between the latter power on the one hand and Peru and Bolivia on the other. The commission was organized, but it rendered no judgments, since the claims were by a convention of August 31, 1886, and a protocol of April 22, 1887, directly settled.<sup>1</sup>

By a convention of July 11, 1885, between Austria-Hungary and Chile, it was agreed that the claims of subjects of the former against Chile should be submitted to the German-Chilean Commission.<sup>2</sup>

**Germany and Hayti.**—In 1895 the claims of German subjects against Hayti were adjusted in the same mode as the claims of British subjects and French citizens hereinafter referred to.<sup>3</sup>

**Great Britain and the Argentine Republic.**—Award of the President of Chile on the claims of British subjects for losses arising out of the Argentine decree of February 13, 1845, prohibiting vessels arriving from Montevideo to enter Argentine ports.

[Translation.]

"José Joaquín Pérez, President of the Republic of Chile, named judge arbiter by the government of Her Britannic Majesty and by that of the Argentine Republic to decide upon various claims for damages sustained by several British subjects against the second of the said governments;

"Having accepted the charge and being desirous to put an end to this difference by making known to the high parties concerned the opinion which I have formed on the matter in dispute;

"Having carefully perused and examined all the antecedents in the matter, and having in view the opinion declared by the supreme court of justice and by the advocate Don Cosmo Campillo, I proceed to give my opinion, as follows:

"On the 13th of February 1845, the Government of the Argentine Confederation, which was then at war with the Republic of Uruguay, issued a decree by which it was declared that, from the 1st of March following,

<sup>1</sup> Calvo, *Le Droit Int.* 4th ed. III. 466.

<sup>2</sup> De Martens, *Recueil*, 2<sup>e</sup> série, XII. 507.

<sup>3</sup> Mr. Smyth, United States Minister to Hayti, to Mr. Moore, May 4, 1896.

<sup>4</sup> The decree in question was as follows:

"BUENOS AYRES, *February 13, 1845.*

"The Government of Buenos Ayres, entrusted with the foreign affairs, and those of peace and war, of the Argentine Confederation, has ordered and decreed:

"ART. I. From the 1st of March next ensuing all communication with the city of Montevideo shall be closed.

"II. The captain of the port shall not allow any vessel proceeding from the port of Montevideo to be entered inwards, whether coming direct or after having called or touched there, whatever be the motive.

"III. Neither shall those vessels be allowed entry which, in order to evade the provisions of the preceding article, leave the port of Monte-



all communication with the port of Montevideo would be closed, and ordained that entrance into the Argentine ports should not be allowed to any ship which might arrive direct from Montevideo, or which might have put into or touched at that place, by whatever accident.

"The representative of Her Britannic Majesty in Buenos Ayres stated to the Argentine Government, in an official note of the 17th of the same month of February, that the immediate execution of the decree would cause severe losses to British commerce, as many British vessels were already dispatched, having part of their cargo for Montevideo and part for Buenos Ayres, and for this reason he proposed that at least some further time should be granted to the British vessels which might arrive from Europe and touch at Montevideo to continue their voyage to Buenos Ayres and discharge in that port the cargoes destined for it.

"The Argentine Government replied, on the 27th of the same month, that the decree of the 13th had gone to the extreme limit in favour of foreign commerce, and that, its terms being general, no change could be made in it in favour of British vessels.

"Under these circumstances six British merchant vessels arrived at Buenos Ayres, proceeding from Europe.

"The *Cetus* sailed from the port of Hull on the 30th of December 1844, bound to Montevideo and Buenos Ayres, and reached the first of those ports on the 18th of March 1845. On the same day the captain went ashore, in order to extend a protest against wind and weather for damages sustained by the vessel during the voyage. Having transacted his business and, in conformity with the orders he then received from the consignees, set sail for Buenos Ayres on the 19th of March, and having arrived at port on the following day, the local authorities prevented her entry.

"The *Sultana* weighed anchor from Liverpool on the 14th of January 1845, and anchored in the outer roadstead of Montevideo at half past 11 p. m. of the 7th of March of the same year. The captain, who had for several days been unwell, landed on the following day, in order to find a pilot to conduct his vessel to Buenos Ayres, but having been informed on returning on board that shortly after he had gone on shore Admiral Browne, commander in chief of the Argentine squadron, had sent a boat to communicate the decree of the 13th of February, he went on board the said admiral's ship and obtained from him a certificate to the effect that his landing had no other object than to procure a pilot. With this the

video for some other south of the line, to reform their papers, and by this deception seek to enter Argentine ports.

"IV. Her Britannic Majesty's packets from Europe and the vessels of war of friendly nations are alone excepted.

"V. The present decree shall have full effect whilst the city of Montevideo is under the dominion of the ruthless Unitarians, and shall cease the moment the army of operations, under the command of His Excellency the legal President of the Oriental Republic of the Uruguay, Brigadier-General Manuel Oribe, shall enter that city.

"VI. Let this be published, &c.

"ROSAS.

"FELIPE ARANA."

vessel proceeded to Buenos Ayres, and, having arrived there on the 18th of March, it received the same repulse as the preceding one.

"The bark *James* left Liverpool on the 17th of February 1845 for Montevideo and Buenos Ayres with a cargo for both ports.

"She arrived at Montevideo on the 24th of April, and having discharged that portion of her cargo destined for that port, according to the tenor of her bills of lading, continued her voyage to Buenos Ayres, and arrived there on the 31st of May, when she, too, was refused entry.

"The brig *Richard Watson* sailed from Cadiz on the 23rd of February 1845 with a cargo of salt destined for Montevideo. Having arrived in front of that port on the 28th of April, she received the orders of her freighters to proceed to Buenos Ayres, and having on the 2nd of May attempted to enter the port, she was prevented from doing so by the maritime authorities.

"The barque *Jean Baptiste* left Liverpool on the 7th of March 1845 with a cargo of general merchandise for Montevideo and Buenos Ayres. Having reached the first of those ports on the 29th of April, and left there a part of her cargo, in conformity with her bills of lading, signed in Liverpool, she continued her voyage to Buenos Ayres, and, on arriving there on the 25th of May, she was there informed by the captain of the port that according to the decree of the 13th of February she could not enter, from having touched at Montevideo.

"The barque *Caledonia*, which left Liverpool on the 6th of April 1845 with a cargo of goods, assorted, for Montevideo and Buenos Ayres, arrived in front of the first of those ports on the 18th of June, and the captain, having there learned of the decree of the 13th of February, stopped there until he had communicated with the Buenos Ayrean authorities. But the representations he addressed to them having been of no avail, in conformity with his bills of lading he entered the port at Montevideo on the 1st of July, and after leaving part of his cargo there he proceeded to Buenos Ayres, where he arrived on the 25th of August. He was there denied entry in the same form and for the same reason as the other vessels had been.

"Each of the captains of the aforesaid six vessels entered a protest at the proper time, and before the proper consular authority, in which all that had occurred was recorded.

"On the 21st of August 1858 a convention was concluded between the high parties interested, in the preamble of which it is stated that they were both desirous 'to arrange the means, mode, and form of payment which was to be made of the debt the Argentine nation recognised as due to the subjects of Her Britannic Majesty for losses sustained during the disorders which occurred in the republic from the civil war, losses which the Argentine nation wished to recognize, following a healing and generous policy.'

"In conformity with this idea, the conditions and form of payment were established and specified in the said convention. According to one of the stipulations of the convention, a commission was appointed, charged with the arrangement, amicably, of all difficulties which might arise in the fulfillment of the compact.

"On the 18th of August 1859 another convention was concluded between the same high parties, which was styled 'additional,' and of which the

object was to determine more clearly some of the stipulations contained in that of the 21st of August. In dictating in this convention rules relating to the rates of interest which ought to be allowed, according to the various classes of losses which the British subjects might claim from the Argentine Government, amongst other matters the following was stipulated: 'For the claims arising out of the destruction of farm property, sequestrations of merchandise, thefts, and other losses, 50 per cent interest on the aggregate amount should be paid, however remote the dates of the events which gave rise to the claim might be.'

"Some years later the British legation addressed the Buenos Ayres Government, claiming indemnification for the losses sustained by the 6 vessels mentioned and their cargoes, and sustaining that those losses were included in those that the Argentine Confederation had recognised in favor of British subjects by the convention of the 21st of August 1858 and of the 18th of August 1859, and therefore ought to be taken into consideration by the commission established by the said convention.

"The Government of Buenos Ayres not only rejected the idea that the losses claimed were included in the recognition conceded by those conventions, but also sustained that no responsibility whatever was incurred by it for the results which the decree of the 13th of February had caused, for the reason that it had been lawfully dictated, and in use of the right which the Argentine nation possessed in consequence of the war in which it was at that time engaged with Montevideo and other towns of the Oriental Republic of Uruguay.

"In the protocol of the 15th of July 1864 the representatives of the British and Argentine Governments agreed to submit to the arbitral decision of a friendly government the question whether the Argentine Republic is obliged to pay the losses sustained by the British subjects in consequence of its having denied the entry into the port of Buenos Ayres to the 6 vessels already mentioned, and in the protocol of the 18th of January 1865 the representatives of the same governments were pleased to name me arbiter for the solution of the said question.

"The representatives of the high parties interested agree, as is expressed in the memorandum which one and the other have presented to me, that the question should be settled in the following manner:

"1st. Are the losses sustained by the British subjects in consequence of those 6 vessels having been refused the entry to the port of Buenos Ayres included or not included in the terms of the conventions of the 21st of August 1858 and of the 18th of August 1859; and secondly, supposing that the said losses are not comprehended in the terms of the said convention, is the Argentine Government obliged in justice or not obliged to indemnify them?

"With respect to the first of these questions, the Government of Her Britannic Majesty sustains that the losses in question are comprehended in the terms of the convention cited, and gives as the ground for that opinion that the words 'and other losses,' which are employed in the additional convention of the 18th of August 1859, refer to those losses; that other claims for losses of an analogous nature, brought forward by British subjects, were taken into consideration by the commission established in Parana, in conformity with the stipulations of the two conventions referred to, and that the commission decided those claims in favor

of the claimants, assigning to them a certain compensation; that in those cases the decisions of the commission were submitted to the Argentine Government, which confirmed them before the coupons were issued for the payment of that which was found due to the claimants; that, as the first article of the convention of the 21st of August 1858 recognized as a national debt all the sums due to British subjects for claims that should have been presented previous to the 1st of January 1860, this recognition could not do less than embrace the claims for every class of losses, inclusive of those which might have arisen from other causes than the disorders of the civil war; that, on the other side, the losses claimed ought to be considered as produced from the disorders of the civil war, because the decree of the 13th of February 1845 was an act of hostility against the authorities established in Montevideo, who were considered as rebels by the Argentine Confederation, which aided General Oribe, and which recognised him as the lawful President of the Republic of Uruguay, against those who occupied the city of Montevideo; and that this mode of viewing the question is confirmed by the tenor of Article V. of the above-mentioned decree, which says: 'The present decree shall have effect and be acted upon whilst the city of Montevideo continues to be under the sway of the Unitarian savages, and cease whenever the army of operations, under the orders of His Excellency Brigadier-General Don Manuel Oribe, lawful President of the Oriental Republic of Uruguay, enters the said city.'

"On the part of the Argentine Government it is answered, that the convention of the 21st of August 1858 recognized as a national debt only the sums due as indemnification for losses caused by the disorders of the civil war; that in the convention of the 18th of August 1859 are classed the losses which the Argentine Government ought to indemnify, and that in none of those classes are comprehended those which are now claimed; that the words 'other losses,' employed in the same convention, can not be applied to losses sustained in consequence of a legitimate act of authority executed within the sphere of its attributes, such as the decree of the 13th of February; that if the commission established in Parana took into consideration claims analogous to those that are now made and if they were admitted by the government established in Parana, such acts were null, because they exceeded the attributes of the commission and of the government, and as acts which are null can not be cited in order to fix the sense of the compact; that it is not credible that if the commission and the Government of Parana had known the true state of affairs they would have made the recognitions that are cited, and that it is not strange that the commission and the said government should be ignorant of the terms of the conventions, because the archives in which they were recorded were at Buenos Ayres and unknown in Parana; that the claims presented previous to the 1st of January 1860, to which reference is made in the convention of the 21st of August 1858, do not refer to all kinds of losses, but only to those caused by the disorders of the civil war, as is expressly declared in Article VI. of the additional convention of the 18th of August 1859, to the effect that 'no claim of the nature of those contemplated in the preamble of the convention of the 21st of August 1858 can be presented after the 31st of December 1860 without prorogation;' that the decree of the 13th of February, which was the origin of the losses sustained by the British vessels, can not be viewed as an incident of civil war,

but as a measure dictated in war abroad, because that measure was adopted against foreign powers who refused to recognise the blockade of the port of Montevideo; that the condition of the cessation of the decree so soon as the city of Montevideo was captured by the army of General Oribe did not give to the decree the character taken in civil war, and that the only character which it impressed was that, when once the city of Montevideo was occupied by the army of General Oribe, there would be no reason for the decree to exist, because in such a case the blockade would cease, and with its cessation the nonrecognition of the blockade which had originated the decree.

"Considering, first, that in the convention concluded on the 21st of August 1858, the Argentine Government only recognised as national debt, in favour of British subjects, that which proceeded from losses which the said subjects had sustained in the disorders occurring in the republic from civil war.

"Second. That the additional convention of the 18th of August 1859 having reference to the principal one of 1858, both ought to be viewed as of the same category, and the intention of the latter one being to indemnify the losses sustained by British subjects in the disorders of the civil war, it ought necessarily to be identical in its object with that of the first.

"Third. That in accordance with the reason just stated, the words 'and other losses,' which are employed by Article II. of the additional convention, can not have reference to losses occasioned in a foreign war, because such signification would alter the nature of the object of the said additional convention and, consequently, that of the principal one.

"Fourth. That although it is said in Article I. of the convention of the 21st of August 1858, that 'the Government of the Argentine Confederation recognises as national debt all the sums due to British subjects for claims that may have been presented previous to the 1st of January 1860, and which shall have been settled jointly by the commissioners of the Argentine Government for that purpose appointed, and by the minister plenipotentiary of Her Britannic Majesty or his representative,' such recognition can only have reference to debts arising from losses occasioned by civil war, which were the only ones that the convention had for its object to liquidate and pay, as is specifically declared in its preamble.

"Fifth. That the signification just given to Article I. of the convention of the 21st of August 1858 is confirmed by the literal tenor of Article VI. of the additional convention of the 18th of August 1859.

"Sixth. That although it is affirmed on the part of the government of Her Britannic Majesty that the commission appointed in virtue of the convention of the 21st of August had taken cognizance of several claims analogous to those which have given rise to the present arbitration, and the decisions of the said commission have been accepted and respected by the Government of the Argentine Confederation, such can not act as a sufficient precedent to establish that the Argentine Government had desired to enlarge the explicit sense of the convention by extending it to cases not literally comprehended in it, inasmuch as the claims which are alluded to on the part of the government of Her Britannic Majesty are not specified, and therefore can not be duly appreciated by the judge arbiter so as to give them the importance and scope attributed to them by the said governments.

"Seventh. That although the fact to which the preceding opinion refers is not contradicted on the part of the Argentine Government, still explanations are given on this point which show that the circumstances in which the said government found itself when it gave its acquiescence to the decisions of the commission did not allow it to examine them with the minute attention due and with relation to the antecedents of each of the cases.

"Eighth. That it being explicitly declared in the convention of the 21st of August that the high contracting parties were solely to establish rules for the liquidation and payment of the debts arising from losses occasioned by the civil war of the Argentine Republic, it is impossible to apply the stipulations of this convention to other debts of a very different nature and origin without the intervention of a declaration equally explicit on the part of the same parties, it being impossible to invoke incidents in order to their being applied which from their vagueness can not be subjected to an exact appreciation, susceptible as they are of divers explanations.

"Ninth. That the war which the Argentine Republic, in alliance with General Oribe, waged against the authorities of Montevideo in the year 1845 was a foreign war.

"Tenth. That although the Oriental Republic of Uruguay was engaged in civil war in the year 1845, the war which the Argentine Government carried on at the time with one of the contending parties and aiding the other could not have that character, because it was made between two nations independent of each other.

"Eleventh. That even considering the war of Uruguay to be solely a civil one, the stipulations of the convention of the 21st of August could not on that account be applicable to losses brought forward by the owners and consignees of the six British vessels, as the said losses ought to be viewed as caused by the civil war of a country distinct from that of the Argentine Confederation, and in no case as caused by the civil war of the said confederation, which is a circumstance indispensable in order that indemnification should be granted according to the said convention.

"For all these reasons I am of opinion that the losses sustained by the British vessels in consequence of the decree issued by the Argentine Government under date of 13th of February 1845 are not comprehended in the terms of the conventions of the 21st of August 1858 and of the 18th of August 1859.

"With respect to the second of the two questions submitted for consideration, the government of Her Britannic Majesty sustains that the Argentine Republic is obliged in justice to indemnify the losses in question, and alleges as a reason that the Argentine Government could not dictate the decree of the 13th of February without giving sufficient time for the prohibition established by it to reach opportunely the knowledge of the vessels which were loading in Europe for Montevideo and Buenos Ayres, or by making itself responsible for the losses arising from the measure if reasons of state should counsel its immediate execution; that from the time when a vessel leaves with its cargo for a fixed port it acquires tacitly the right to be admitted into it, and no one can deprive it of that benefit without contracting the obligation to allow it compensation; that of the vessels in question some left Europe even before the decree had been

issued, and the others before the time had elapsed requisite for its coming to their knowledge; that to none of the vessels was the decree made known by the blockading squadron, and that all of them reached Montevideo in complete ignorance of what had occurred; that if it be wished to say that the decree was issued as a reprisal against Great Britain for not having recognised the strict blockade of Montevideo the fact is entirely incorrect, because the decree gives no such reason, nor is it to be believed that if there had been in it the design of acting hostilely against Great Britain the English packets proceeding from Europe would have been excepted, as they are in Article IV.; that, on the other side, the British Government, far from refusing to recognise the blockade, Sir T. Pasley, commandant of the naval forces of Her Britannic Majesty in the waters of Montevideo, addressed, on the 29th of January 1845, a letter to the admiral of the Argentine squadron, in which he assured him that the blockade would be recognised by the forces under his command; that only later, when the admiral of the squadron of His Majesty the King of the French refused to recognise the blockade, it was that Sir T. Pasley claimed for English vessels the same immunities that might be conceded to the French; that there being no mention of the present claims in the convention concluded between the Argentine Republic and the British Government on the 24th of November 1849, in which other claims of the same nature were accepted, is not a proof that the present ones were abandoned by the Government of Great Britain, because Mr. J. H. Mandeville, minister plenipotentiary of Her Britannic Majesty, having opportunely presented a demand against the losses which the decree of the 13th of February might inflict upon English commerce, without his pretensions having obtained any solution, it would have been necessary, in order that they should be considered as renounced by the said convention, that it should have been so expressly stipulated; and, finally, that amongst the six vessels which were refused entrance into the port of Buenos Ayres there were some of them that in reality had not infringed the decree of the 13th of February, as they had only stopped in front of Montevideo without entering the port or executing in it any acts whatsoever.

"The Argentine Government accepting the fact of its having impeded the entry of the 6 vessels into the port of Buenos Ayres, to which the claims of the British Government refer, and setting entirely aside the circumstance of whether or not the losses, which on that account are claimed, were actually sustained, maintains that it is not obliged to indemnify them, and gives as its reason that, finding itself, as it then did, at war with Montevideo, it could undoubtedly dictate the decree of the 13th of February in which it prohibited traffic with that port, and that this being a legitimate act of warfare, neutral nations had no right to complain of its consequences; that, although the *Sultana* and other vessels had sailed for Buenos Ayres and arrived at Montevideo in entire ignorance of the decree, and although they had not been notified of it by the Argentine squadron, they were not on that account exempted from the obligation of complying with it, because measures of this kind do not require a term to be fixed for their being executed, and all to which those who are ignorant of those measures can pretend is not to be captured instead of being only obliged to execute them, as it is known that, in case of a blockade, although a term is given that vessels entering be not captured, it is never the cus-

tom to authorise them to enter; that it was not the duty of the Argentine squadron, but that of Her Britannic Majesty, which was in front of Montevideo, to make known the provisions of the decree to British subjects, and, notwithstanding this, notice was given to the *Sultana* by the Argentine squadron, as is admitted by the British legation in its note of the 11th of May 1845; that if this principle is applicable to neutral commerce it is so with much more reason towards powers with whom we are not in a state of perfect peace, and that the decree of the 13th of February was actually issued in consequence of the chief of the British naval forces having refused to recognise the blockade, as is established by a letter which, in reply to the intimation of the same blockade, Commander Pasley, under date of the 29th of January, addressed to Admiral Browne, demanding that execution of the blockade should be postponed until the chargé d'affaires of Her Britannic Majesty at Montevideo should have received from the minister of Her Britannic Majesty at Buenos Ayres a certain communication on the subject, which he considered necessary; that, in conformity with this pretension, Mr. Mandeville, on the 30th of January, requested 'that the date of strict blockade, both as respected entry and departure, should be postponed,' to which the Government of Buenos Ayres replied, 'that the blockade, having been ignored by the forces of Her Britannic Majesty, without any right to do so, his request could not be taken into consideration;' that all this, at the same time that it confirms the fact of Great Britain's having refused to recognise the blockade, clearly shows that this nonrecognition was the cause of the issue of the decree of the 13th of February; that the exception in favour of the English packets from Europe was not an indication of good relations with Great Britain, because it proceeded solely from this, that those packets did not at that time bring cargo, and that which it was intended to prevent was that goods should enter Montevideo; that in the convention of the 24th of November 1849, in which is expressly stipulated the restoration of the vessels and cargoes captured during the blockade of the Argentine ports established by Great Britain, no mention whatever is made of the losses suffered by English vessels in consequence of the prohibition established in the decree of the 13th of February, which proves that in the opinion of the British Government the measure was perfectly legal; that the Government of Buenos Ayres did not find itself in the case of demanding, when concluding that convention, the abandonment of a right which in its opinion did not exist, and that it was for the Government of Her Britannic Majesty to solicit the recognition of that right; that instead of doing this, it obliged itself to restore that which it had captured, without recording any compact or expression with respect to the losses now claimed; that the decree of the 13th of February, so far from having been at any time impugned by Great Britain, has been expressly recognised and respected by its diplomatic agents in various instances, in proof of which it cites the note, which on the 11th of March 1845, on the occasion of what had occurred to the *Sultana*, Mr. Mandeville addressed to the Government of Buenos Ayres, in which, without making any observation against the legitimacy of the decree, he asked the admission of the vessel on the ground solely that it had not infringed the said decree, because its entering into Montevideo had no other object than to seek a pilot; and that his request having been refused by the Argentine



Government, the British legation neither insisted on it nor protested, the same thing having occurred in various other representations of a like nature at that time made to the Government of Buenos Ayres by the English minister.

"Considering, first, that the decree issued by the Argentine Government the 13th of February 1845 had for object to cause to be respected the blockade of the port of Montevideo, which the same government had at that time established.

"Second. That the state which resolves to blockade the port of another with which it is at war, has the right to dictate all the measures tending to cause the blockade to be respected by neutrals.

"Third. That it was neither natural nor just to exact from the Argentine Confederation that it should give reception in its ports to vessels that might have violated the blockade, and it being, on the contrary, natural and just that it should refuse to receive them.

"Fourth. That a term is not given to neutral vessels within which they may enter a blockaded port. Neither can it be exacted that it be granted to them in order that they may submit themselves to the measures dictated for the purpose of causing an established blockade to be respected.

"Fifth. That the nation which in a state of war resolves to close its ports to foreign commerce is the sole judge in determining the conditions under which the entry to them may be permitted, and to decide whether those who claim to enter have complied or not complied with those conditions.

"Sixth. That it is a principle of universal jurisprudence that he who uses his right offends no one.

"By the force of these reasons, I am of opinion that the Government of the Argentine Confederation is not obliged to indemnify the losses suffered by the 6 vessels which were refused entry into the port of Buenos Ayres in virtue of the decree of the 13th of February 1845, issued by the said government.

"Let this friendly decision be communicated to the high parties interested, to each of whom will be remitted a copy of it.

"Given in the hall of my public office, sealed with the seal of the republic, and countersigned by my secretary for foreign affairs in Santiago de Chile, on the 1st of August 1870.

[L. S.]

"JOSE JOAQUIN PEREZ.

[L. S.]

"MIGUEL LUIS AMUNATIZIN."

**Great Britain and Brazil: Case of the "Forte."**—In June 1861 the barque *Prince of Wales* was wrecked on the coast of Rio Grande do Sul, in Brazil; ten or twelve persons were lost and the cargo was plundered. The nearest British consul investigated the affair, and in his reports upon it expressed the opinion that some of the persons on board the barque had, after reaching the shore, been foully dealt with. Three natives were convicted of plundering the cargo, but, while one of them was imprisoned, two escaped across the frontier. The British consul expressed the opinion that the local authorities had been culpably negligent in their prosecution of the case, if indeed some of them were not interested, as accomplices, in shielding the offenders. The British Government demanded redress. The Brazilian Government maintained that the authorities had done their duty, and that no national responsibility had been incurred.

While this case was pending, Rear-Admiral Warren reported to the British minister at Rio de Janeiro "a disagreeable incident," which he described as a "brutal outrage" on three officers of his flagship, the *Forle*, by the Brazilian guard stationed on Tijuca Hill. The officers in question were the chaplain, a lieutenant, and a midshipman. It was stated that at 7 o'clock on a certain evening, while they were passing the police guardhouse at Tijuca, a sentinel advanced and made a motion with his musket; that the chaplain inquired, "Que quere V.?" that the sentinel then struck him with his musket, attempted to stab him with the bayonet, and called the guards, who rushed upon him with bayonets and swords; that all three officers were then arrested and confined in the guardhouse; that on the next morning they were marched through the streets of Rio under escort, though they offered to hire a carriage; that at the Rio police office, though they gave their names and rank, as they had done the evening before at the guardhouse, they were kept for two hours in a filthy den with men and boys of the lowest grade; that they were then, at the request of the British consul, with whom they had been permitted to communicate, removed to a better prison, and were afterward taken in a carriage to a barrack and well treated; and that on the morning of the second day after their arrest they were released by order of the chief of police.

On the part of the Brazilian Government it was stated that "three foreigners, having dined at the hotel of Robert Bennett, on the Tijuca Hill, where they had two bottles of Bordeaux wine and one-half bottle of Cognac, were proceeding to the city;" that "the said foreigners" annoyed the passers-by, "attempting to unhorse an equestrian who was going home quietly, and violently seizing the reins of his horse;" that when they arrived at the guardhouse they mounted the steps and approached the sentinel, one of them asking, "What are you doing there?" that the sentinel told them to retire, when they broke out into threats and began to strike him with their sticks so that he was compelled to defend himself with the stock of his gun and call the guards; that they resisted arrest, "laying hold of the soldiers and falling on the ground with them;" that, being deposited in the guardhouse, they refused to answer any questions, "showing themselves haughty and scornful;" that, though they refused to give their names, the commandant treated them with kindness, furnishing them, at their request, with writing paper and playing cards, and placed at their disposal his own bed, the only one in the guardhouse; that they "were not completely drunk," but "appeared not to be in full possession of their mental faculties;" that when they were brought into the city, they were placed not in the slaves' prison, but in that of freemen, where there might, indeed, be prisoners of color, as the Brazilian legislation made no discrimination on that ground; that as soon as their condition was made known to the chief of police they were transferred to the barracks of the police corps and an order was given for a circumstantial report on the case; and that as it appeared by this report that "the acts of the English officers were merely the result of the state in which they were at the time," an order was given for their discharge.

The English officers denied the allegations as to their intoxication, their annoyance of persons on the road, and their use of threats toward

the sentry. They declared that no resistance was made to the guards by two of the officers, and that resistance was made by the third only after he had received gross treatment. They also stated that when taken to the guardhouse they gave their names to the ensign, both verbally and in writing, through an interpreter. They admitted that the officer of the guard provided them with paper and with a pack of cards, and offered a bed to one of them; but they alleged that he broke his promise to forward their letters, which never reached their destination.

The British minister at Rio was instructed by Earl Russell to demand (1) that the ensign of the guard be dismissed from the service; (2) that the sentry who began the attack be adequately punished; (3) that an apology be made by the Brazilian Government, and (4) that the chief of police of Rio de Janeiro be publicly censured.

Demands having thus been formulated in the case of the *Forte*, as well as in that of the *Prince of Wales*, steps were taken to resort to reprisals in the event of the requisite redress being denied. The British minister at Rio was instructed that a ship or some other portion of public property might be seized and held as security till justice should be done; but that as such a course might lead to a collision, it might be preferable to seize private property. This was, however, left to the discretion of Admiral Warren, who, after the Brazilian Government had refused to yield to his government's demands, seized at sea and detained five Brazilian vessels. It was subsequently arranged that the claim in the case of the *Prince of Wales* should be paid under protest and the captured vessels released, the Brazilian Government assuming responsibility for any losses which might have resulted to the citizens of third countries, and that the case of the *Forte* should be submitted to arbitration.<sup>1</sup>

The King of the Belgians, who was chosen as arbitrator, made the following award:<sup>2</sup>

"Nous, Léopold, Roi des Belges, ayant accepté les fonctions d'arbitre qui nous ont été conférées de commun accord par la Grande Bretagne et par le Brésil, dans le différend qui s'est élevé entre ces Etats au sujet de l'arrestation, le 17 Juin 1862, par le poste de la police Brésilienne situé à la Tijuca, de 3 officiers de la Marine Britannique, et des incidents qui se sont produits à la suite et à l'occasion de cette arrestation;

"Animé du désir sincère de répondre par une décision scrupuleuse et impartiale à la confiance que les dits Etats nous ont témoignée;

"Ayant à cet effet dûment examiné et mûrement pesé tous les documents qui ont été produits de part et d'autre;

"Voulant, pour remplir le mandat que nous avons accepté, porter à la connaissance des hautes parties intéressées le résultat de notre examen, ainsi que notre décision arbitrale sur la question qui nous a été soumise dans les termes suivants, à savoir;

"Si dans la manière dont les lois Brésiliennes ont été appliquées aux officiers Anglais il y a eu offense envers la Marine Britannique;

"Considérant qu'il n'est nullement démontré que l'origine du conflit soit le fait des Agents Brésiliens, qui ne pouvaient raisonnablement pas avoir de motifs de provocation;

<sup>1</sup> Br. and For. State Papers, LIV. 579.

<sup>2</sup> Br. and For. State Papers, LIII. 150.

"Considérant que les officiers lors de leur arrestation n'étaient pas revêtus des insignes de leur grade, et que dans un port fréquenté par tant d'étrangers ils ne pouvaient prétendre à être crus sur parole lorsqu'ils se déclaraient appartenir à la Marine Britannique, tandis qu'aucun indice apparent de cette qualité ne venait à l'appui de leur déclaration; que, par conséquent, une fois arrêtés ils devaient se soumettre aux lois et règlements existants et ne pouvaient être admis à exiger un traitement différent de celui qui eût été appliqué dans les mêmes conditions à toutes autres personnes;

"Considérant que, s'il est impossible de méconnaître que les incidents qui se sont produits ont été désagréables aux officiers Anglais et que le traitement auquel ils ont été exposés a dû leur paraître fort dur, il est constant toutefois que, lorsque par la déclaration du vice consul Anglais la position sociale de ces officiers eut été dûment constatée, des mesures ont aussitôt été prises pour leur assurer des égards particuliers, et qu'ensuite leur mise en liberté pure et simple a été ordonnée;

"Considérant que le fonctionnaire qui les a fait relâcher a prescrit leur élargissement aussitôt que cela lui a été possible, et qu'en agissant ainsi il a été mû par le désir d'épargner à ces officiers les conséquences fâcheuses qui aux termes des lois devaient forcément résulter pour eux d'une suite quelconque donnée à l'affaire;

"Considérant que, dans son rapport du 6 Juillet 1862, le préfet de police n'avait passé seulement à faire la narration des faits, mais qu'il devait rendre compte à l'autorité supérieure de sa conduite et des motifs qui l'avaient porté à user de ménagements;

"Considérant qu'il était, dès lors, légitimement et sans qu'on puisse y voir aucune intention malveillante, autorisé à s'exprimer comme il l'a fait;

"Nous sommes d'avis que, dans la manière dont les lois Brésiliennes ont été appliquées aux officiers Anglais, il n'y a eu ni préméditation d'offense, ni offense, envers la marine Britannique.

"Fait et donné en double expédition, sous notre sceau royal, au Château de Lachen, le 18<sup>me</sup> jour du mois de Juin 1863.

"LEOPOLD I."

After this decision in favor of Brazil was rendered, Mr. (afterward Sir) Edward Thornton was sent by the British Government as envoy extraordinary and minister plenipotentiary on a special mission to express to the Brazilian Government the regret of Her Britannic Majesty for the circumstances under which friendly intercourse between the two countries was suspended; to disavow any intention to offend the dignity of Brazil by the measures that were taken, and to propose the renewal of diplomatic relations. The Emperor replied, saying that it was with sincere satisfaction that he renewed diplomatic relations, and that the policy of Brazil would continue to be animated with a spirit of justice toward all other nations.<sup>1</sup>

Great Britain and Chile.—By a convention signed at Santiago January 4, 1883, Great Britain and Chile agreed to refer to a mixed commission of three persons, to be respectively appointed by the two governments

<sup>1</sup>Apontamentos para o Direito Internacional ou Collecção completa dos Tetrados celebrados pelo Brasil com Diferentes Nações Estrangeiras, etc. Por Antonio Pereira Pinto. Tomo IV. 378-379.

themselves and the Emperor of Brazil, the claims of British subjects growing out of "the acts and operations effected by the land and maritime forces of Chile in the territories and coasts of Peru and Bolivia" from February 14, 1879, the date on which hostilities between those three powers began, till the day on which treaties of peace or covenants of truce between the belligerents should be concluded, or until such time as hostilities should cease. The total number of claims submitted to the tribunal was 118, of which 97 seem to have been disposed of by it, some being allowed and others rejected. Twenty-one claims were withdrawn and directly settled by the two governments. The nominal amount of all the claims was upward of \$6,000,000. The total amount recovered seems to have been about \$275,000. The largest claim before the tribunal—that of the Peruvian Guano Company, Limited, for £792,233 13s. 5d., for loss sustained by it in consequence of its being unable, owing to the war, to carry out a contract with the Peruvian Government for mining and selling guano—was disallowed on the ground that the damages were not "directly caused by the operations of the land or sea forces of Chile on the coast or territory of Peru."

The convention here in question was one of several—all of which were substantially identical in terms—concluded by Chile with France and various other powers for the settlement of the claims of their citizens or subjects against the Government of Chile, growing out of the war between Chile, on the one hand, and Peru and Bolivia on the other. Under all these conventions the appointment of the third commissioner was confided to the Emperor of Brazil, who designated Senhor Lopez Netto. He assumed the discharge of his duties as president of the various tribunals in 1884. On the 19th of November in that year a decision was rendered by his vote in the case of the Italian subject Luis Cuneo, who demanded damages (1) for the destruction of a store and goods by the bombardment of the Peruvian port of Pisagua, on April 18, 1879, and (2) for the pillaging and burning of another store and goods by Chilean soldiers in November 1879, while they were occupying the town. An award was made in favor of the claimant of £6,000, with interest at 6 per cent, on the first item of the claim. The reasons for this award, as stated by the third arbitrator, were that the object of the operations of the Chilean men of war on April 18, 1879, was to destroy some small trading vessels in the port, and that this might have been accomplished by some shots directed at the vessels, or by means of a demand addressed to the authorities; that Pisagua was an open town, without fortifications, artillery, or other serious means of defense; that the population was almost exclusively composed of neutrals, engaged in commerce—a circumstance of which the commander of the Chilean forces could not have been ignorant; that the Peruvian garrison of the place consisted of some national guards and policemen; that this garrison, on the approach of the fleet of Chilean boats, used its arms to repel the aggression, placing itself for that purpose at the two extreme points of the town and outside of it, toward which the Chilean vessels' boats were coming; that the resistance made by the garrison, in which the population took no part, and which could not seri-

<sup>1</sup> For. Rel. 1888, I. 172; see *Sentencias pronunciados por el Tribunal Anglo-Chileno, 1884-1887*.

ously interfere with the destruction or capture of the trading vessels, caused little injury to the Chilean crews; that, nevertheless, after the boats withdrew, two Chilean men of war—the *Blanco Encalada* and the *Chacabuco*—began, without summons, notification, or previous warning, the bombardment of the defenseless place; that, after a suspension of an hour, more or less, the men of war changed their position, and, ranging themselves precisely opposite to the inhabited and commercial part of the town, bombarded it for several hours, burning and destroying it almost entirely; that the bombardment of open and undefended towns is inadmissible unless as an absolute military necessity; that the operation in question could not be justified as a chastisement deserved by the defenders of the town, because those defenders, having received no summons or notice, only did their duty, under the laws of war, in repelling the aggression of an enemy, who, armed and in an attitude of war, approached the land within gunshot; and because in every point of view it was improper to make the chastisement fall on an inoffensive, peaceable, and unarmed population composed for the most part of neutrals; that no necessity of war justified the omission of warning, by which the lives of many inhabitants would have been spared, and the goods of the merchants might have been saved; that if neutrals, living in the theater of war, may count on the protection of their lives and property by reason of the general duties prescribed for belligerents, they ought also to have the benefit of the actual circumstances under which the Chilean Government had formally and officially promised the foreign legations that it would fulfill its international duties; that the principles thus laid down in regard to the bombardment of undefended or unfortified places were admitted and maintained by the Chilean Government on the occasion of the bombardment of Valparaiso in 1866.<sup>1</sup>

This and other decisions gave rise to a discussion in the press. In February 1885 Senhor Lopez Netto returned to Brazil on the ground of ill health. The Emperor appointed to succeed him Senhor Lafayette Rodrigues Pereira, whose views differed in many respects from those of his predecessor. It seems that no more claims growing out of bombardments were allowed.<sup>2</sup>

Great Britain and Chile, and Chile and Sweden and Norway.—A mixed commission of three persons, one appointed by Chile, one by Great Britain, and the third, who should be neither a Chilean citizen nor a British subject, by the two governments in concert, was established by a convention of September 26, 1893, for the decision of claims of British subjects growing out of "the acts and operations executed by the land and sea forces

<sup>1</sup> Calvo, *Le Droit Int.* 4th ed. III. 456.

<sup>2</sup> Calvo pronounces the views of Senhor Lopez Netto "liberal and conformable to the law of nations." He says that the doctrines maintained by his successor may be summed up in three propositions: (1) Every bombardment is a legitimate operation of war, whether against an open town or a fortified place, when there was a beginning of resistance, however feeble it may have been. (2) Governments are not responsible for pillages, destruction of property, and fires, caused by armed soldiers, without the order of their officers, and when the latter could not prevent them. (3) Proofs are inadmissible which have been produced without the citation of the other party. (*Le Droit Int.* 4th ed. III. 459, 461.)

of the Republic" of Chile "during the civil war which began on the 7th of January 1891 and ended on the 28th of August of the same year," as well as out of "subsequent events" for which the Chilean Government might be held responsible. By Article X. of the convention it was provided that if the high contracting parties should be unable to agree on an umpire, the King of the Belgians should be requested to name one. It was found necessary to resort to this stipulation, and His Majesty named Mr. Camille Janssen. Her Britannic Majesty appointed Mr. Lewis Joel, formerly British consul at Valparaiso; the President of Chile, Señor Luis Aldunate, who was connected with the Anglo-Chilean and Italo-Chilean tribunals of 1884-1888. The mixed commission met in Santiago October 24, 1894, and chose Mr. Janssen as its president. December 27, 1894, Mr. Joel ceased to act on account of ill health. He was succeeded by Mr. Alfred St. John, British consul at Callao. Don Diego Armstrong, a citizen of Chile, was appointed as secretary. Señor Martinez de F., who was connected with the United States and Chilean commission under the convention of 1892, appeared as agent for Chile. The last session of the tribunal was held March 4, 1896. The British claims submitted numbered 101.

In an analysis of the work of the commission by Mr. Edward H. Strobel,<sup>1</sup> the claims were classified as follows:

"I. For loss of property by the fire in Iquique on February 19, 1891, 20 claims, amounting to £17,319 9s. 4d. and \$24,359. Disallowed, the British arbitrator dissenting on the ground that the fire was caused by the bombardment, which was considered a legitimate act of warfare.

"II. For loss of property by fire in Pisagua on April 6, 1891, 5 claims, amounting to £4,013 18s. 2d. and \$4,016.98. Disallowed unanimously on the same ground as the preceding class.

"III. Loss of property by fire and pillage on the entry of the Congressional troops into Valparaiso August 28, 1891, 5 claims, amounting to £1,150 and \$44,273.50. Disallowed, the British arbitrator dissenting, on the ground that the authorities were powerless to prevent the disorder.

"IV. Loss of property by the sacking of Santiago on August 29, 1891, 1 claim, amounting to \$30,393.95. Disallowed unanimously on the same ground as the preceding class.

"V. Loss of property through pillage by government troops of Miramar in August 1891, 4 claims, amounting to £4,787 19s. and \$3,679.15. An agreement was made between the British and Chilean agents by which the Chilean Government paid a lump sum of £2,097 12s. in settlement of these claims. This action was probably due to the decision of the commission of the United States and Chile at Washington in favor of W. S. Shrigley, No. 4, which belonged to this class.

"VI. For murder near Valparaiso, 1 claim, presented by the widow of the victim, for £20,000. Dismissed unanimously for want of jurisdiction, because there was no evidence that the murder had been committed by military forces.

"VII. For illegal imprisonment, 2 cases, amounting to £5,400. Dismissed unanimously for want of jurisdiction, because there was no evidence to show that the imprisonment complained of was by order of the Chilean military forces.

<sup>1</sup> Dispatch of April 23, 1896, For. Rel. 1896, 35.

"VIII. For illegal imprisonment and cruelty, 2 claims, amounting to £25,000. Dismissed unanimously for want of jurisdiction, on two grounds: First, because the imprisonment was not by the military authorities, and second, because the acts complained of had taken place after the time fixed by the convention, which embraced the period from January 7 to August 28, 1891. The two cases of this class were Patrick Shields and Andrew McKinstrey, respectively Nos. 23 and 24, before the commission at Washington.

"IX. For seizure of mules, horses, etc., in different parts of the republic, 18 claims, amounting to £19,586 4s. 1d. and \$48,263.97. Four claims were awarded, the Chilean arbitrator dissenting in all but one case, \$15,572.82. Twelve claims were disallowed for want of evidence, and on 2 claims the tribunal came to no decision.

"X. For damage to railway lines and interruption of traffic, 2 claims, amounting, respectively, to £1,310 4s. 8d. and \$200,000. The tribunal awarded, respectively, the Chilean arbitrator dissenting, \$9,542 and \$11,721.85.

"XI. Services rendered by railways to the government by conveyance of troops, war materials, etc., 2 claims, amounting to £48,775 19s. 5d. and \$40,011.98. Dismissed, with the dissenting vote of the British arbitrator, for want of jurisdiction, as being proper subjects for the courts of the country.

"XII. Forced discharge of cargo arriving for railway company at Antofagasta, 1 claim, amounting to £184 0s. 7d. Disallowed for want of evidence.

"XIII. For refusal to grant clearance papers to vessels and their consequent detention, 12 cases, amounting to £8,984 19s. 6d. Dismissed for want of jurisdiction, on two grounds: First, because the act complained of was the result of an administrative order and not the act of military forces; second, because the indemnity is provided for by the treaty of amity, commerce, and navigation of 1854 between Great Britain and Chile. The refusal of the Chilean arbitrator to sign these decisions is the subject of my following dispatch of this date.

"XIV. For demurrage, 21 claims, amounting to £19,584 2s. 11d. Eighteen were unanimously disallowed because the delay was caused in consequence of warlike operations and the general state of affairs during the revolution. The remaining were dismissed for want of jurisdiction, because the damage complained of was the result of the action of the civil authorities.

"XV. For preventing vessels from communicating with people on shore at the port into which she had put in distress, 1 claim for £450 8s. 4d. Dismissed for want of jurisdiction, because it was the act of the civil authorities.

"XVI. For dead freight through vessels being prevented from loading their full cargo because military forces had blown up the loading apparatus at Lobos de Añera, 5 claims, amounting to £7,382 15s. 6d. Four claims were awarded, £3,960 6s. 2d. The remaining claim was dismissed for want of jurisdiction on account of there being no evidence that it was the act of military forces.

"XVII. For breach of charter party by government through inability to furnish cargo on account of destruction by troops of loading apparatus



at Lobos de Afuera, 1 claim, amounting to £4,218. Awarded, Chilean arbitrator dissenting, £1,500.

"XVIII. For injury to vessels and delay in consequence of bombardment, 4 claims, amounting to £2,518 19s. 4d. Disallowed, acts complained of being those of legitimate warfare.

"XIX. For notification of vessel on high seas of the existence of a blockade which was only a paper blockade, and causing her to proceed to a different port, 1 claim, amounting to £989 1s. 2d. Disallowed for want of evidence."

Under Class XIII. Mr. Strobel refers to one of his dispatches for further information as to the refusal of the Chilean arbitrator to sign certain decisions. These decisions related to the bark *Chépica* and eleven other cases to which the same principles applied. The *Chépica*, when bound for Tocopilla, a port in the possession of the Congressional party, was detained at Valparaíso and Coquimbo under a decree of President Balmaçada. The Belgian and British arbitrators concurred in a decision that the tribunal had no jurisdiction of the case, (1) because the detention, being the result of an administrative decree, was not an act of the land or sea forces of the republic during the civil war in the sense of the convention, and (2) because a special remedy for the case was provided by the treaty of amity and commerce between Great Britain and Chile of October 4, 1854, a treaty still remaining in force. The Chilean arbitrator concurred as to the first reason, but dissented as to the second. By Article V. of the convention the decisions of the tribunal were required to be signed by all the members, but the Chilean arbitrator refused to sign the decision in question unless his dissenting opinion was embodied in or added to it. The Belgian and British arbitrators declined to permit this on the ground that the dissenting opinion formed no part of the decision; and for the reason that the decision was not signed by all the arbitrators the Chilean agent refused to accept notification of it.<sup>1</sup>

The decision was as follows:

*"Decision of Belgian and British arbitrators on claim of bark Chépica.*

"I. Considering that the convention of arbitration of September 26, 1893, only submits to the jurisdiction of this tribunal 'claims based upon acts or operations executed by the land and sea forces of the republic during the civil war which began on January 7, 1891, and ended on August 28 of the same year.'

"Considering that the refusal on the part of the authorities of the port of Valparaíso to permit the bark *Chépica* to sail for Tocopilla on March 7, 1891, because the latter port was at that time occupied by revolutionary forces does not partake of the character of an act executed by the land forces of the republic, but an act of the *de jure* government of the country executed in accordance with law; that article 7 of the act of December 26, 1872, authorized the President of the republic 'to close temporarily one or more ports to commerce whenever extraordinary circumstances require it; that such a measure, dictated as a measure of urgency when the forces of the Congressional party occupied the ports of the north, was

<sup>1</sup> For. Rel. 1896, 37.

ratified by supreme decree dated April 1, 1891, which declared the eight first-class ports of the north, from Chanaral to Pisagua, as well as the intermediate harbors, closed to commerce; that the fact that this measure, which from the point of view of an internal public law is entirely legal, had been taken by the *de jure* government of the country during the civil war, is not sufficient to give it the character of an act executed by the land forces of the republic against the bark *Chépica*.

"II. Considering that article 17 of the treaty of amity, commerce, and navigation, concluded on October 4, 1854, between Chile and Great Britain, stipulates that whenever in case of war, and when the interests of the state are so seriously affected as to necessitate such action, one of the contracting parties shall decree the general embargo or closing of ports, merchant vessels can only claim certain stipulated indemnities if the detention or closing exceeds the period of six days; that by this clause Great Britain recognizes that the Chilean Government has the right to detain vessels and to close ports in case of war, but on condition of granting certain indemnities; that the claim being based upon measures taken in time of war, we must examine whether this tribunal has jurisdiction to apply the provisions of the treaty of October 4, 1854, to the case in question, since, by the very terms of the convention, it must observe the rules of international law, which comprises the general law of nations and the special law of nations established by treaties. (A. Merignhac, *Traité Théorique et Pratique de l'Arbitrage International*, Paris, 1895, p. 289; Calvo, *Le Droit International Théorique et Pratique*, Vol. III. p. 1768.)

"Considering that the measure taken by the government of President Balmaceda regarding the bark *Chépica*, destined to a port in the north of Chile, is invested with the character of a ruler's decree (*arrêt de prince*), which is but one of the forms of embargo, as is admitted by the agent of the Chilean Government (Calvo, *Le Droit International*, Vol. III. p. 1277; Carlos Testa, *Le Droit Public International Maritime*, Paris, 1886, p. 128); that if the government has the right in time of war, in the interest of its own defense, to detain neutral vessels in its ports, and refuses them authorization to proceed to certain ports which are declared closed, the exercise of this right not only involves its moral responsibility, but also its real responsibility, whenever the case has been provided for in an international treaty, a circumstance which exists in the present case; that otherwise there would result, at least as regards vessels which are in the ports of the country that are not closed and destined for ports which are closed, the establishment of a paper blockade prohibited by modern international law.

"Considering, besides, the decree of April 1, 1891, promulgated by President Balmaceda, and placing upon a regular basis the measures of urgency which had already been taken, declares that the eight first-class ports situated between Chanaral and Pisagua, as well as the intermediate harbors, are closed to commerce; that as this measure, which is applicable to an extended coast, and to all vessels without distinction of nationality which may be anchored in the ports still in possession of the government, may be considered as a general closure of the ports provided for by article 17 of the treaty of 1854; that a belligerent can not without exposing himself to responsibility, especially when the measure is provided for in the treaties concluded by such belligerents, declare one or several ports over

which he has lost all control to be closed pending the duration of a war, except on the condition of employing force to prevent access to them, and for imposing in this way an effective blockade. 'In the case where a revolution or civil war breaks out in a country,' says Lord John Russell, quoted by Hall, 'the government can not declare ports which are in possession of the insurgents to be closed, and such a measure would be a violation of the laws of blockade.' (W. E. Hall, *A Treatise on International Law*, Oxford, 1890, p. 37, Note X.; De Holtzendorff, *Éléments de Droit International Public*, p. 75.)

"Considering that if the measure taken by President Balmaceda in reference to the bark *Chépica* falls under article 17 of the treaty of 1854, which regulates the question of indemnity in case of embargo or general closing of ports, the same article provides for the appointment of special arbitrators whose duty it is, in case of disagreement, to fix the amount of indemnities, and that consequently this tribunal has no jurisdiction to give a decision in this case.

"For these reasons the tribunal of arbitration unanimously declares that it has no jurisdiction to decide the present case, the Chilean arbitrator having declared that he does not accept, for reasons stated in his dissenting opinion, the second ground upon which the tribunal declares itself without jurisdiction.

"Santiago, December 12, 1895.

"CAMILLE JANSSEN.

"ALFRED ST. JOHN.

"The undersigned, arbitrators of Belgium and Great Britain, declare that, having requested the Chilean arbitrator to sign the preceding award in conformity with article 5 of the convention, he has formally refused to do so.

"Santiago, February 8, 1896.

"CAMILLE JANSSEN.

"ALFRED ST. JOHN.

"On February 23, 1896, I notified the British agent.

"FREDERICK KERR.

"DIEGO ARMSTRONG, *Sec'y*.

"On March 3, 1896, on notifying the agent of Chile, he declared that he did not accept the notification, because, in accordance with paragraph 3, article 5, of the convention of September 26, 1893, he did not consider anything a decision which did not bear the signatures of the three arbitrators. He refused to sign.

"DIEGO ARMSTRONG, *Secretary*."

By a convention signed July 6, 1895, between Chile and Sweden and Norway, it was agreed to refer to the Anglo-Chilean tribunal the claims of subjects of Sweden and Norway against Chile. Two such claims were submitted. The tribunal gave judgment on one of them, and declared itself incompetent to recognize the other.

There were thus 103 claims submitted to the commission. They amounted to 4,050,354 pesos and 65 centavos, of which 3,307,621 pesos and 60 centavos represented principal, and 742,733 pesos 5 centavos interest. The tribunal

awarded as principal 251,179 pesos 95 centavos, and interest 144,119 pesos 10 centavos.

The records of the various claims and the awards of the commission were edited by Mr. Martinez and printed by the Chilean Government.<sup>1</sup>

**Great Britain and France.**—Declaration by which Great Britain and France mutually accept the arbitration of Prussia on the claims of British subjects arising from the measures adopted by France in the years 1834, 1835, on the coast of Portendic:

*“PARIS, November 14, 1842.*

“The measures adopted by the French Government in 1834, 1835, on the coast of Portendic, during the war in which it was engaged with the Trarza Moors, gave rise to numerous and pressing claims on the part of the British merchants engaged in the gum trade on that coast. Those claims were from 1836 up to 1840 the subject of much correspondence and discussion between the British and French governments; but no understanding having been come to thereupon, commissioners on both sides were appointed in 1840 to examine into the said claims and to endeavor to put an end to the difference of which they were the cause. These commissioners, however, not having been able to arrive at any agreement, the British Government has proposed that the affair should be submitted to the arbitration of His Majesty the King of Prussia; and the French Government being desirous to give a proof of the sentiments of justice by which it is animated, and placing entire confidence in the wisdom and perfect impartiality of His Majesty the King of Prussia, has agreed to this proposition, declaring, nevertheless, that whatsoever may be the nature or form of the decision pronounced by the arbiter, that decision will not, in its eyes, be regarded as prejudicing in any way, even by induction, the principles which it has invariably professed in the matter of blockades and maritime law, nor as affecting any of the rights belonging to the sovereignty which it has always claimed to hold, in virtue of treaties, over the coast of Portendic. In like manner the British Government declares that the decision of the arbiter, whatever it may be, will not, in its eyes, even by induction, be considered as prejudicing any rights it has claimed or any principle it has asserted. The two governments, therefore, have agreed to submit to the examination of His Majesty the King of Prussia the whole of the claims as to this affair which have been presented by British subjects, and to request His Majesty to be pleased to pronounce as arbiter upon the question as to whether, in consequence of the measures and circumstances which preceded, accompanied, or followed the establishment and the notification of the blockade of the coast of Portendic in 1834, 1835, any real injury was unduly inflicted on such and such British subjects, while they were pursuing on the said coast a regular and lawful trade, and as to whether France is equitably bound to pay to such class of the said claimants any compensation by reason of such injury.] If, as the two governments hope, His Majesty the King of Prussia should graciously accept the arbitration which it is their desire to place in his hands, com-

<sup>1</sup> Reclamaciones presentados at Tribunal Anglo-Chileno (1894-1896), 4 vols. The convention between Chile and Sweden and Norway of July 6, 1895, was sent to the Department of State, with a translation, by Mr. Strobel, in his dispatch No. 42, September 21, 1895.

munication shall be made to him of all the dispatches, notes, and other documents which have been exchanged in this affair between the two governments; and His Majesty will also receive all further information which he may require, as well as all that which either government may think it necessary to lay before him.

"The two governments, moreover, engage mutually to accept the decision of the King of Prussia and its consequences; and should that decision declare indemnity to be due to such or such class of British claimants, commissioners of liquidation, the one English, the other French, to whom, if necessary, shall be adjoined a Prussian as umpire, shall be charged with the application of the said decision to the individual claims which have been presented by British subjects, and shall determine the sum which ought to be allowed for each claim comprised within the classes of claims to which the arbiter shall have declared an indemnity to be due.

"In witness whereof we, ambassador extraordinary and plenipotentiary of Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, at the court of His Majesty the King of the French; and we, minister and secretary of state for the department of foreign affairs of His Majesty the King of the French, duly authorized by our respective sovereigns, have signed the present declaration and affixed thereto our seals.

"Done in duplicate, at Paris, the 14th day of November of the year 1842.

[L. S.]

"GUIZOT.

[L. S.]

"COWLEY."

Award of the King of Prussia, on the claims of British subjects against France, arising out of measures adopted by the French authorities in 1834 and 1835, on the coast of Portendic:

"BERLIN, *November 30, 1843.*

"Nous Frédéric-Guillaume IV, par la grâce de Dieu, Roi de Prusse.

"Ayant accepté l'arbitrage que Sa Majesté la Reine du Royaume Uni de la Grande Bretagne et d'Irlande, et Sa Majesté le Roi des Français, en vertu d'une Déclaration signée par leurs plénipotentiaires respectifs, à Paris, le 14 novembre, 1842, ont remis entre nos mains, afin de terminer par ce moyen, le différend qui s'est élevé entre eux au sujet de certaines réclamations formées par des négociants anglais contre le Gouvernement français, en conséquence des mesures adoptées par les autorités Françaises, en 1834 et 1835, sur la côte de Portendic;

"Et ayant, aux termes de la dite Déclaration, à nous prononcer, comme Arbitre, sur la question de savoir, si par suite des mesures et des circonstances qui ont précédé, accompagné, ou suivi l'établissement et la notification du blocus de la côte de Portendic en 1834 et 1835, un préjudice réel a été indûment apporté à tels ou tels sujets de Sa Majesté Britannique, exerçant sur la dite côte un trafic régulier et légitime, et si la France est équitablement tenue de payer à telle ou telle classe des dits réclamants des indemnités à raison de ce préjudice;

"Ayant, à cet effet, soigneusement examiné et mûrement pesé le contenu des dépêches, notes, et autres pièces que les Envoyés Extraordinaires et Ministres Plénipotentiaires de leurs dites Majestés près notre Cour ont respectivement transmis, sous la date du 19 avril dernier, à notre Ministre des Affaires Etrangères;

"Déclarons que:

"Quant aux réclamations auxquelles ont donné lieu les procédés du

brick de guerre Français *Le Dunois*, à l'égard des bâtiments marchands anglais *Le Governor Temple* et *L'Industry*;

"Nous sommes d'avis,

"Que le Gouvernement français devra indemniser les sujets de Sa Majesté britannique des pertes qu'ils ont essuyées par suite des dits procédés, à l'exception toutefois de celles auxquelles se rapporte la réclamation qui a été élevée relativement à l'adjoint du subrécargue du navire Anglais *Le Matchless*.

"Quant aux pertes occasionnées par la mesure dont le bâtiment marchand anglais *L'Eliza*, a été l'objet de la part des bâtiments de guerre français qui l'ont renvoyé de Portendic sans lui permettre d'y prendre auparavant le chargement de gomme qui lui était dû en échange des marchandises déjà délivrées aux Maures, vendeurs de la gomme:

"Nous sommes d'avis,

"Que la France est équitablement tenue de payer une indemnité à raison de ces pertes.

"Quant aux autres réclamations relatives à la mise en état de blocus par le Gouvernement français de la côte de Portendic;

"Nous sommes d'avis,

"Que la France devra indemniser les réclamants des dommages et préjudices auxquels ils n'auraient pas été exposés si le dit Gouvernement, en envoyant au Gouverneur du Sénégal l'ordre d'établir le blocus, avait simultanément notifié cette mesure au Gouvernement anglais; que la France, au contraire, malgré l'omission de cette notification officielle du blocus, ne doit aucune indemnité pour les pertes essuyées à la suite d'entreprises commerciales auxquelles les réclamants se sont livrés après que, par autres voies, ils ont positivement eu connaissance de la formation du blocus de Portendic, ou qu'ils auraient pu, du moins, en être informés par suite de la nouvelle authentique parvenue à cet égard, au Gouvernement Britannique, de la part de quelque autorité anglaise en Afrique.

"Pour ce qui regarde l'application de la décision arbitrale que nous venons de rendre aux réclamations individuelles, ainsi que la fixation du montant de chacune de celles auxquelles une indemnité doit être allouée, elles devront se faire, conformément à la Déclaration du 14 novembre, 1842, par des Commissaires liquidateurs, l'un Anglais, l'autre Français, départagés au besoin par un commissaire surarbitre que nous aurons à nommer.

"Fait en double, et donné sous notre Sceau Royal, à Berlin, ce 30<sup>me</sup> novembre, de l'an de grâce 1843.

[L. S.]

"FREDERIC GUILLAUME, R.<sup>1</sup>

"BULOW."

**Great Britain and France: British Mineral Oil Claims.**—By Article IV. of a convention of commerce and navigation between France and Great Britain of July 23, 1873, it was agreed to refer to two commissioners, who should have power to name a third, claims for alleged excessive duties charged in France on British mineral oils.<sup>2</sup> The two commissioners were duly appointed and entered upon the discharge of their duties. They set aside all "indirect claims" and arranged in four categories the claims founded on

<sup>1</sup> Br. and For. State Papers, XLII. 1377.

<sup>2</sup> Br. and For. State Papers, LXIII. 207-213.

alleged direct damage. They exercised in only two cases the right which they possessed of examining on the merits claims which had been presented to the French courts and revising the amounts awarded by them. They held seventeen sittings and disposed of all the claims before them without referring any to the third commissioner, or umpire. No allowance was made to claimants for counsel fees or for the expenses of submitting their claims to the commission. The amount of the claims as presented was 982,719.77 francs; the amount allowed was 314,393.33 francs.<sup>1</sup>

**Great Britain and France.**—July 19, 1893, an award was rendered by R. B. Martin, M. P., as arbitrator between France and Great Britain, on the subject of the "Greffühle Concessions." Neither the record of the case nor the award has been published.

**Great Britain and France: The Newfoundland Fishery.**—By Article XIII. of the Treaty of Utrecht, France ceded to Great Britain the Island of Newfoundland. By the same article, however, it was agreed that it should "be allowed to the subjects of France to catch fish, and to dry them on land," in that part of the island "which stretches from the place called Cape Bonavista to the northern point of the said island, and from thence, running down by the western side, reaches as far as the place called Point Riche," but that it should "not be lawful for the subjects of France to fortify any place" in the island, "or to erect any buildings there besides stages made of boards and huts necessary and usual for drying of fish, or to resort to the said island beyond the time necessary for fishing and drying of fish." These stipulations were "renewed and confirmed" by Article V. of the Treaty of Paris of 1763. By Article V. of the Treaty of Versailles of 1783, France renounced the fishery from Cape Bonavista to Cape St. John, but retained it from Cape St. John, passing to the north, and then descending on the western coast of the island, to Cape Ray. By a declaration accompanying the Treaty of Versailles, His Britannic Majesty specially engaged to assure to the French the rights guaranteed to them by the treaties. During the conflicts that marked the close of the last and the beginning of the present century, the enjoyment of those rights was necessarily suspended; but they were reestablished by the treaties of Paris of May 30, 1814, and November 30, 1815. They still survive; but they have continued to furnish, just as they did after their first concession, subjects of dispute, which have been diversified and complicated by the introduction of new methods of fishing, and especially by the development of the lobster fishery. Into these subjects it is not our purpose now to enter. In 1891 an agreement was arrived at by the two governments for the submission of the lobster fishery question to a commission of arbitration, and it was stipulated that, after this question should have been decided, other questions on the definition of which the two governments should not have reached an agreement, should be submitted to the commission. The matter is still pending.<sup>2</sup>

<sup>1</sup> Br. and For. State Papers, LXV. 426-434. The final award may be found at the place here referred to. It is technical, and, in the absence of the documents on which it is based, to a great extent unintelligible.

<sup>2</sup> See Appleton, *The Newfoundland Fishery Question*; also, Rouard de Card, *L'Arbitrage International*, 136.

**Great Britain and Germany: Arbitration as to the Island of Lamu.**<sup>1</sup>—Nous, baron Lambermont, Ministre d'Etat de Sa Majesté le Roi des Belges.

Ayant accepté les fonctions d'arbitre qui nous ont été conférées par le Gouvernement de S. M. Empereur d'Allemagne, Roi de Prusse, et par le Gouvernement de S. M. la Reine de Grande-Bretagne et d'Irlande, Impératrice des Indes, au sujet d'un différend survenu entre la Compagnie allemande de Witu et la Compagnie impériale anglaise de l'Afrique orientale;

Animé du désir sincère de répondre par une décision scrupuleuse et impartiale à la confiance que les deux gouvernements nous ont témoignée;

Ayant, à cet effet, dûment examiné et mûrement pesé les documents qui ont été produits de part et d'autre;

Et voulant statuer sur l'objet du litige qui est l'affermage des douanes et de l'administration de l'île de Lamu, située à la côte orientale d'Afrique;

L'une des parties revendiquant pour la compagnie allemande de Witu la priorité du droit quant à cette prise à ferme;

L'autre soutenant que le feu Sultan et le Sultan actuel de Zanzibar se sont engagés à concéder ce même affermage à la compagnie impériale anglaise de l'Afrique orientale et que les objections élevées du côté de l'Allemagne ne sont pas de nature à mettre obstacle à ce que le Souverain de l'île de Lamu remplisse les obligations contractées par son prédécesseur et par lui-même envers cette société.

I. Considérant que le mémoire présenté par le Gouvernement impérial allemand fait, en premier lieu, dériver le droit de la compagnie de Witu de la convention intervenue, les 29 octobre et 1<sup>er</sup> novembre 1886, entre l'Allemagne et l'Angleterre et de la portée qui aurait été attachée à cet accord par les puissances contractantes;

Attendu que la dite convention a circonscrit le terrain sur lequel elle devra recevoir son application dans des limites expressément déterminées, à savoir, en partant de la mer, la Rowuma au sud et le Tana au nord;

Qu'elle a ensuite divisé cet espace en deux zones, séparées par une ligne de démarcation suivant le Wanga ou Umbe;

Que, de ces deux zones, l'une est attribuée exclusivement à l'influence allemande qui s'exercera au *sud* de la ligne de démarcation et l'autre exclusivement à l'influence anglaise qui s'exercera au *nord* de la même ligne;

Que les limites respectives des deux zones d'influence sont ainsi nettement fixées et sont formées par la ligne de démarcation et le périmètre au delà duquel elles ne pourraient s'étendre sans sortir du territoire régi par l'arrangement;

Attendu que, pour tirer de l'esprit ou du sens de la convention une conséquence qui ne naît pas de son texte et qui attribuerait à l'Allemagne une liberté exclusive d'action sur les territoires situés au nord du Tana, il faudrait qu'une entente spéciale et nouvelle se fût, à cet effet, établie entre les puissances contractantes et qu'elle fût dûment constatée;

Qu'il n'est produit aucun acte justifiant de l'existence d'une telle entente, et

Que cette constatation ne résulte point de la note du gouvernement britannique en date du 7 septembre 1888, puisque, en reconnaissant que la sphère d'influence anglaise ne s'étend pas jusqu'à la rivière Osi, ce document est en parfaite concordance avec les termes de l'accord de 1886, qui

<sup>1</sup> Moniteur Belge, Angust 28, 1890.



limite son application aux territoires compris entre la Rowuma et le Tana,

Par ces motifs :

Nous sommes d'avis que, sauf la clause qui reconnaît comme appartenant au territoire de Witu la bande côtière entre Kipini et l'extrémité septentrionale de la baie de Manda, l'accord anglo-allemand des 29 octobre et 1<sup>er</sup> novembre 1886 n'étend pas plus ses effets au delà du Tana qu'au delà de la Rowuma et ne donne à aucune des parties un droit de préférence quant à l'affermage des douanes et de l'administration de l'île de Lamu, située en dehors des limites dans lesquelles cet arrangement doit, d'après ses propres termes, recevoir son application.

II. Considérant que, selon le mémoire allemand, les îles de la baie de Manda, au point de vue géographique, appartiennent au pays de Witu dont elles formeraient le prolongement; que, envisagée sous le rapport commercial, l'île de Lamu est le lieu de dépôt des marchandises qui arrivent du pays de Witu ou qui sont destinées à cette possession allemande, et enfin que sa dépendance du continent apparaît encore dans l'ordre juridique ou politique à raison des relations multipliées des habitants de l'île avec le continent et des questions de propriété ou de culture qui s'y rattachent, l'ensemble de ces faits démontrant que l'administration de l'île doit être confiée aux mains qui détiennent celle du continent;

Considérant que, de son côté, le mémoire anglais représente l'île de Lamu comme étant, depuis longtemps, un entrepôt du commerce britannique, un lieu d'escale pour les bateaux à vapeur de la Compagnie des Indes britanniques desservant l'Afrique orientale et un centre de commerce qui est presque exclusivement entre les mains de négociants anglais;

Attendu qu'aucune déduction tirée du voisinage du continent ne saurait, en ce qui concerne l'île de Lamu, prévaloir contre la clause formelle de l'accord anglo-allemand des 29 octobre et 1<sup>er</sup> novembre 1886, qui range cette île parmi les possessions dont la souveraineté est reconnue au Sultan de Zanzibar, et

Qui, si des considérations basées sur l'intérêt économique et administratif ou sur des convenances politiques peuvent mettre en lumière les avantages ou les inconvénients qu'offrirait une solution conforme aux vues de l'une ou de l'autre des parties, de telles raisons ne tiennent pas lieu d'un mode d'acquisition reconnu par le droit international,

Par ces motifs :

Nous sommes d'avis que ni la dépendance géographique, ni la dépendance commerciale, ni l'intérêt politique proprement dit ne mettent aucune des parties en position de réclamer, à titre de droit, la cession des douanes et de l'administration de l'île de Lamu.

III. Les questions d'un caractère préjudiciel ainsi résolues et le débat étant amené sur le terrain des engagements qu'auraient pris les Sultans de Zanzibar envers les deux parties :

Considérant qu'il y a lieu de rechercher si, et jusqu'à quel point, les engagements invoqués par les deux parties réunissent les conditions nécessaires à la justification de leur existence et de leur validité;

En ce qui concerne la compagnie allemande de Witu :

Considérant que, le 10 décembre 1887, le consul général d'Allemagne et M. Tüppen, représentant de la Compagnie de Witu, ont été reçus en audi-

ence par le Sultan Sayd Bargash, audience dont le consul général a rendu compte à son gouvernement par un rapport qui n'est pas produit, mais dont le mémoire allemand termine l'analyse en ces termes: "Le résultat de cet entretien développé peut être résumé en ce sens que le Sultan se déclarait être immédiatement prêt (sofort sich bereit erklärte) à accorder la concession pour les îles de la baie de Manda à Compagnie de Witu aussitôt que l'autre arrangement avec la compagnie orientale africaine allemande serait conclu, et qu'il ne désirait conserver sa liberté d'action que pour la fixation de l'un ou de l'autre mode de l'indemniser en argent;" et que, dans sa lettre du 16 novembre 1888, au Sultan Sayd Khalifa, le consul général s'exprime ainsi: "Je me permets de rappeler que sous Sayd Bargash déjà des négociations se sont poursuivies tendant à une concession des îles de la baie de Manda à la compagnie allemande de Witu, dont M. Töppen est le représentant à Lamu; Sayd Bargash a reçu M. Töppen en ma présence et il s'est montré prêt à prendre un semblable engagement (Sayd Bargash hat seine bereitwilligkeit ein derartiges abkommen zu treffen ausgesprochen) aussitôt que la convention avec la compagnie orientale africaine serait arrivée à conclusion;"

Attendu que les termes dont se serait servi le Sultan, pris dans leur sens naturel, impliqueraient l'intention de conclure une convention;

Que, pour transformer cette intention en une promesse unilatérale valant convention, l'accord des volontés aurait dû se manifester par la promesse expresse de l'une des parties, jointe à l'acceptation de l'autre, et que cet accord de volontés aurait dû porter sur les éléments essentiels qui constituent l'objet de la convention;

Attendu que, dans une espèce telle que celle dont il s'agit, la prise à ferme des douanes et de l'administration d'un territoire ou d'un port devait être un contrat synallagmatique, comprenant de la part du bailleur la cession de l'exercice de droits souverains qui peuvent être formulés de manières très diverses quant à leur objet et leur durée et consistant de la part du preneur en une redevance fixe ou proportionnelle;

Que dans les paroles attribuées au Sultan, telles qu'elles sont résumées par le mémoire allemand et reproduites par la lettre du consul général d'Allemagne du 16 novembre 1888, les conditions essentielles du contrat à intervenir ne se trouvent pas déterminées;

Attendu que, si aucune loi ne prescrit une forme spéciale pour les conventions entre Etats indépendants, il n'en est pas moins contraire aux usages internationaux de contracter verbalement des engagements de cette nature et de cette importance;

Que l'adoption de la forme écrite s'impose particulièrement dans les rapports avec les gouvernements de nations peu civilisées, qui souvent n'attachent la force obligatoire qu'aux promesses faites en une forme solennelle ou par écrit;

Que, surtout dans l'espèce, l'existence d'une convention verbale devrait résulter de stipulations formelles et qu'on ne pourrait, sans grave préjudice pour la sécurité et la facilité des rapports internationaux, la déduire de la simple déclaration qu'on est prêt à accorder une concession;

Attendu qu'il n'est produit d'autres pièces écrites vers l'époque dont il s'agit que la lettre, en date du 21 novembre 1887, par laquelle le consul général d'Allemagne a transmis au Sultan Sayd Bargash la proposition de

M. Töppen et l'accusé de réception du Sultan, daté du même jour, et qui ne se prononçait pas sur le fond;

Que, entre le 10 décembre 1887, date de la promesse qu'aurait faite le Sultan, et le 28 mars 1888, date de sa mort, il n'est fourni aucun document, aucune indication écrite ou verbale émanant de Sa Hautesse et constatant ou impliquant son assentiment à la proposition du représentant de la Compagnie Witu;

Que, d'après les assurances réitérées du Sultan actuel et données soit au consul général d'Allemagne, soit au consul général d'Angleterre, on n'aurait découvert, ni dans les archives du sultanat, ni dans les souvenirs des employés, aucune trace de cet acquiescement et que, eût-on retrouvé les pièces écrites qui viennent d'être mentionnées, l'accusé de réception du Sultan Sayd Bargash aurait témoigné qu'à leur date Sa Hautesse n'avait rien préjugé;

Que, dès lors, quel que soit le sens que l'on attache aux paroles du Sultan Sayd Bargash, la preuve de l'ouverture de la négociation a seule été administrée; qu'en ce qui concerne l'engagement lui-même, s'il en est fait mention dans la lettre que le consul général d'Allemagne a écrite au Sultan, le 16 novembre 1888, et s'il est rapporté dans la dépêche adressée par le même agent à son propre gouvernement à la suite de l'audience du 10 décembre 1887, il doit être de principe, en matière internationale comme en tout autre et toute question de bonne foi à part, qu'on ne peut se créer de titre à soi-même;

Attendu enfin, quelque digne de confiance que soit l'agent consulaire et sa bonne foi étant absolument mise hors de cause, que les paroles du Sultan Sayd Bargash ont été prononcées en arabe, recueillies et traduites par un drogman sans qu'il soit possible de contrôler la fidélité de cette traduction et que leur interprétation n'a été ni confirmée par le défunt Sultan, ni reconnue par son successeur,

Par ces motifs:

Nous sommes d'avis que la preuve de l'engagement qu'aurait contracté le Sultan Sayd Bargash au 10 décembre 1887 d'affirmer les douanes et l'administration de l'île de Lamu à la Compagnie allemande de Witu n'est pas fournie à suffisance de droit, et

Que, en conséquence, ladite compagnie ne peut fonder aucun droit de préférence ou de priorité sur les déclarations du Sultan au cours de l'entretien qui a eu lieu à cette date;

Considérant qu'il y a lieu d'examiner si les faits accomplis depuis l'avènement du Sultan actuel ne sont pas venus modifier le bien-fondé de ces conclusions;

Attendu que, d'après le mémoire allemand, le Sultan Sayd Khalifa aurait déclaré au consul général d'Allemagne, en juin 1888, qu'il n'accorderait plus aucune concession sans s'être entendu avec les représentants de l'Allemagne et de l'Angleterre et que, d'après la lettre du consul général d'Allemagne au Sultan, en date du 16 novembre suivant, ce dernier l'aurait assuré qu'il n'existait pas encore de proposition anglaise et que, s'il s'en produisait, il demanderait à l'avance l'opinion du consul général d'Allemagne;

Attendu que, dans sa lettre du 12 janvier 1889 au dit consul général, Sayd Khalifa se défend d'avoir fait ou pu faire ces déclarations, l'erreur

pouvant dans son opinion provenir d'un malentendu attribuable au drogmanat et que, dans sa lettre du 16 du même mois au consul général d'Angleterre, lettre insérée au mémoire anglais, Sa Hautesse a répété ses dénégations;

Que, sans mettre en question la bonne foi des parties, on peut et on doit reconnaître que les déclarations dont il s'agit n'auraient pu conférer par elles-mêmes aucun droit à la Compagnie de Witu sur l'île de Lamu, et

Que, au surplus, quant à leur portée à d'autres égards, elles tomberaient par leur forme sous l'application des principes ci-dessus développés,

Par ces motifs :

Nous sommes d'avis que les faits postérieurs à l'entretien du 10 décembre 1887 n'ont pas changé sa portée, telle qu'elle est définie dans les conclusions précédentes;

En ce qui concerne la Compagnie impériale anglaise de l'Afrique orientale :

Considérant que, dans le système du mémoire anglais, les Sultans de Zanzibar auraient, dès 1877, constamment tenu à la disposition de M. William Mackinnon, de ses associés et de la future compagnie britannique une concession de territoires comprenant l'île de Lamu, que la dite concession, loin d'être jamais rejetée ou retirée, aurait été acceptée de temps en temps pour ce qui concerne certaines parties de ces territoires, le reste, et particulièrement Lamu, ayant été réservé à la disposition ultérieure des dites personnes et de la dite compagnie;

Attendu que le contrat de cession qui doit servir de base à ces promesses n'est représenté qu'en un projet qui ne porte ni date ni signature;

Que, dans cette forme, on ne peut y voir qu'une proposition faite au Sultan Sayd Bargash, sans qu'il soit prouvé que celle-ci ait été transformée en une concession de Sa Hautesse à M. Mackinnon ou en une promesse générale de céder l'administration du sultanat à la compagnie anglaise, promesse que cette société aurait successivement acceptée pour les diverses parties des territoires appartenant au Sultan;

Qu'aucun des actes postérieurs allégués par la compagnie anglaise ne mentionne directement et clairement ce projet, qui n'a reçu aucun commencement d'exécution;

Que le témoignage du général Mathews, commandant des troupes du Sultan, témoignage inscrit au mémoire anglais et reçu sous serment, le 25 janvier 1889, rappelle des *négociations* entamées environ neuf ans auparavant et poursuivies jusqu'au commencement de 1887, mais ne cite aucune convention conclue pendant cette période;

Que l'écrit en forme solennelle remis par le Sultan Sayd Bargash au consul général d'Angleterre, à la date du 6 décembre 1884, eût été inutile si le projet de 1877 avait eu la valeur d'une promesse contractuelle liant absolument le Sultan à l'égard de la Compagnie impériale anglaise;

Qu'il n'est pas possible, à l'aide des documents produits, de rattacher à ce projet, par un lien direct d'où résulterait l'exécution d'une convention antérieure parfaite et valable, les négociations qui ont été reprises par M. Mackinnon au printemps de 1887;

Attendu que, à la date du 22 février 1887, le Sultan Sayd Bargash adressa à M. Mackinnon un télégramme par lequel Sa Hautesse se déclarait prête à lui accorder les concessions qu'il (M. Mackinnon) avait antérieurement proposées et que cette offre a été suivie, le 24 mai, de la conclusion d'un

accord concédant à la Compagnie impériale anglaise la bande côtière de la Wanga à Kipini;

Que, dans cet accord, il n'est fait aucune mention des territoires situés au nord de Kipini et comprenant l'île de Lamu;

Que, à l'égard de ceux-ci, la Compagnie impériale anglaise se borne à invoquer le témoignage du général Mathews, déclarant qu'à sa connaissance ces territoires ont été offerts par le Sultan à M. Mackinnon en 1887; qu'il a toujours compris qu'ils ont été réservés, selon le désir de M. Mackinnon, pour une concession ultérieure, et qu'il fut envoyé, comme représentant du Sultan, faire à M. E. N. Mackensie, agent de la Compagnie impériale anglaise, une communication verbale l'autorisant à informer M. Mackinnon que tous les territoires au nord de Kipini lui seraient offerts de préférence quand ils viendraient à être affermés ou cédés;

Attendu qu'on ne peut trouver dans le message verbal dont a été chargé le général Mathews, quelque considération d'ailleurs que puisse mériter son témoignage, les éléments d'une promesse actuelle et positive de faire une concession dont les conditions essentielles seraient suffisamment déterminées, et

Que, quant à l'acceptation réservée ou anticipée de M. Mackinnon, elle ne fait l'objet de la part du général que d'une appréciation purement personnelle;

Attendu que le témoignage du général Mathews est en concordance avec le télégramme ci-dessus cité du Sultan Sayd Bargash quant à l'intention de traiter avec les Anglais et que cette intention se retrouve et prend corps dans la lettre adressée par son successeur, le 26 août 1888, au consul général d'Angleterre;

Que toutefois, si cette dernière lettre constitue un engagement politique de gouvernement à gouvernement de ne point céder l'administration du sultanat à d'autres qu'à des sujets du Sultan ou à des Anglais ou à M. Mackinnon pour ce qui concerne Zanzibar et Pemba, on n'y rencontre pas encore la promesse directe et actuelle de céder à la Compagnie impériale anglaise elle-même tous les ports du Nord;

Attendu que l'intention de traiter avec les Anglais est, d'autre part, exprimée d'une manière évidente dans la lettre de Sayd Khalifa au consul général d'Allemagne, en date du 12 janvier 1889, et

Qu'il n'y a pas lieu de s'arrêter à l'objection que cette détermination serait viciée pour avoir eu une cause fautive, à savoir que le Sultan Sayd Khalifa ne l'aurait prise qu'en raison d'une promesse qu'il croyait avoir été faite par son prédécesseur à la société anglaise, la connaissance de la communication faite, le 22 février 1887, par son prédécesseur, ainsi que des démarches faites au nom de celui-ci par le général Mathews ayant pu légitimement influencer sur sa résolution, et le Sultan ayant pu d'ailleurs ne pas se décider d'après un mobile unique, ainsi qu'il ressort de sa dite lettre au consul général d'Allemagne et de celles qu'il a, dans le cours du même mois, adressées au consul général d'Angleterre et qui sont reproduites au mémoire anglais;

Attendu que l'intention itérativement manifestée par le Sultan Sayd Khalifa s'est traduite en fait par les négociations qui s'ouvrirent au mois de janvier 1889 entre Sa Hautesse et M. Mackensie, mandataire de M. Mackinnon;

Que, dans ces négociations, les conditions essentielles de la reprise de l'administration et des douanes de l'île de Lamu ont été posées et débattues pour la première fois entre les parties;

Que l'accord des volontés s'est établi sur tous les points, ainsi que cela résulte de l'échange des lettres du 19 et du 20 janvier 1889 entre le Sultan et M. Mackensie, combiné avec le télégramme du Sultan à M. Mackinnon en date du 30 du même mois;

Mais attendu que l'acte ainsi préparé n'a pas reçu la signature du Sultan et que celui-ci l'a subordonnée à la levée d'un obstacle qui arrêta sa détermination définitive,

Par ces motifs:

Nous sommes d'avis que le Sultan est resté maître de disposer de l'exercice de ses droits souverains dans les limites tracées par la lettre de son prédécesseur à sir John Kirk du 6 décembre 1884 et par celle qu'il a lui-même adressée au consul général d'Angleterre le 26 août 1888, et

Que la Compagnie impériale anglaise de l'Afrique orientale ne produit aucun engagement valablement pris envers elle par l'un des Sultans de Zanzibar et créant en sa faveur un droit exclusif à la reprise des douanes et de l'administration de l'île de Lamu;

Considérant enfin que la signature de la convention formulée entre le Sultan Sayd Khalifa et le représentant de la Compagnie impériale anglaise de l'Afrique orientale n'a été différée qu'à raison de l'opposition du consul général d'Allemagne;

Et attendu que cette opposition se fonde sur le droit de priorité réclamé par la Compagnie allemande de Witu, droit dont la réalité a fait l'objet de conclusions précédentes,

Par ces motifs:

Nous sommes d'avis que l'accord projeté entre le Sultan Sayd Khalifa et le représentant de la Compagnie impériale anglaise de l'Afrique orientale au sujet de l'île de Lamu peut être signé sans donner prise à une opposition fondée en droit.

Fait à Bruxelles, en double original, le 47 août 1889.

B<sup>n</sup> LAMBERMONT.

BRUXELLES, le 17 août 1889.

Monsieur LE MINISTRE,

MYLORD. Je remets entre les mains de Votre Excellence la sentence arbitrale que j'ai prononcée au sujet de l'île de Lamu en acquit du mandat que le gouvernement impérial allemand et le gouvernement de Sa Majesté britannique m'ont fait l'honneur de me conférer.

Arbitre et non médiateur, je n'avais à dire que le droit et ne pouvais entrer dans le domaine des transactions.

Mais si les études auxquelles j'ai dû me livrer et une loyale pensée de conciliation pouvaient m'y autoriser aux yeux des deux gouvernements, je consignerais ici, à titre purement personnel et sans rentrer dans le cercle rigoureux de ma mission juridique, l'impression que m'a laissée l'examen des faits accomplis ou qui s'accomplissent dans l'Afrique orientale et un vœu qui est au fond de mes sentiments:

En 1886, l'Allemagne et l'Angleterre, dans un esprit de commune entente et par un accord auquel a adhéré le Sultan de Zanzibar, ont réglé leurs droits respectifs dans une partie importante de l'Afrique orientale. Cet

acte n'était pas et ne pouvait être complet: il correspondait à une situation donnée et devait, en quelque sorte, marcher avec les événements. Ce que l'on a fait, il y a trois ans, pour les territoires au sud du Tana, ne pourrait-on le faire pour ceux qui s'étendent au nord de ce fleuve? Je ne me permets pas de trancher cette question. Il appartient aux gouvernements intéressés de l'examiner et, le cas échéant, de choisir le moment opportun. Sur un si vaste théâtre, il existe de multiples éléments de transaction. Si un nouvel accord venait à les coordonner, non seulement on pourrait arriver à des combinaisons résolvant les difficultés présentes dans un sens réciproquement avantageux, mais on éliminerait pour l'avenir la source même des dissidences qui, dans l'état présent des choses, tendent à se multiplier.

Ces résultats si désirables, on ne peut les attendre d'un jugement qui statue en droit et sur un cas isolé: il sépare les intérêts en cause, il ne les concilie pas; il peut laisser subsister des regrets, il ne supprime pas le principe de compétitions capables d'entraver l'essor d'œuvres civilisatrices pour lesquelles l'esprit de concorde et le concours de toutes les énergies bienfaisantes sont la première condition de succès. C'est le vœu sincère de l'arbitre de voir les deux hautes puissances compléter sous ce rapport la tâche qui lui est échue et aboutir à un compromis général digne de leur sagesse, digne de la sollicitude qu'elles manifestent au même degré pour les graves intérêts engagés dans la prise de possession des territoires africains par les nations ne l'Europe.

Au moment où expire ma mission, j'ai à cœur d'exprimer encore une fois ma profonde gratitude pour le témoignage de confiance dont j'ai été l'objet et que je reporte tout entier à mon pays et à son Souverain. Permettez-moi d'espérer, monsieur le Ministre, Mylord, que Votre Excellence, avec son obligeance si parfaite, voudra bien me servir d'organe auprès du gouvernement de l'Empereur, de la Reine.

Je saisis avec empressement cette occasion d'offrir à Votre Excellence les assurances de ma haute considération.

Bon LAMBERMONT.

Son Excellence Monsieur D'ALVENSLEBEN,

*Envoyé Extraordinaire et Ministre Plénipotentiaire de S. M. l'Empereur d'Allemagne, Roi de Prusse,*

Son Excellence LORD VIVIAN,

*Envoyé Extraordinaire et Ministre Plénipotentiaire de S. M. la Reine de Grande Bretagne et d'Irlande, Impératrice des Indes.*

**Great Britain and Hayti.**—By a protocol concluded in 1890 it was agreed to submit to a mixed commission consisting of a British subject, a Haytian citizen, and an umpire, to sit at Port au Prince, claims of British subjects against Hayti arising on or after August 5, 1888, and on or before the signature of the protocol. The submission embraced (1) claims relating to bills or orders issued to pay for supplies while General Légitime exercised power at Port au Prince, as well as those relating to the emission of loans by that general; (2) claims relating to damages and injuries suffered by British subjects as well in the provinces as at Port au Prince at the hands of the civil or military authorities of Hayti during the then recent civil war; and (3) claims for services rendered under divers heads and in various capacities to the Haytian Government, and

for which that government had promised to pay. In addition to the claims regularly within its competence, the mixed commission was specially empowered to declare on its conscience whether the fires at Port au Prince of the 4th and 7th of July 1888 were lit in the midst of a riot, or whether they were ordered by the territorial authority or were even due to the fault of that authority. Claims founded on "dommages-intérêts" were expressly excluded from allowance by the commission.

The commission thus provided for was in session at Port au Prince in 1892.<sup>1</sup>

**Great Britain and Liberia.**—In 1879 an effort which began several years previously for the arbitration of a boundary dispute between Great Britain and Liberia came to an unsuccessful end. As early as 1871 the United States was asked to appoint an arbitrator in the matter.<sup>2</sup> In 1878 Commodore Schufeldt was named. He arrived at Sierra Leone January 19, 1879. "I anticipate," he said, "a long and somewhat tedious discussion and examination of this boundary question, as it will involve the testimony not only of the witnesses, citizens or subjects of both parties, but apparently necessitate the examination of the chiefs and head men of the various tribes now occupying the disputed territory."<sup>3</sup> The investigation of the subject was begun, but the commissioners were unable to reach an agreement as to the submission of the matter to the arbitrator, and Commodore Schufeldt, after a lengthened detention in the neighborhood of Sierra Leone, was compelled to depart, leaving his mission unfulfilled.<sup>4</sup>

**Great Britain and Mexico.**—By a convention signed June 26, 1866, and ratified November 19 of the same year, it was agreed to refer to a mixed commission the claims of British subjects against Mexico.<sup>5</sup>

**Great Britain and the Netherlands: Case of the "Costa Rica Packet."**—By a convention signed at The Hague May 16, 1895, the governments of Great Britain and the Netherlands agreed to submit to arbitration the claims preferred by the former against the latter growing out of the arrest and precautionary detention in the Netherlands Indies of Mr. Carpenter, master of the whaling ship *Costa Rica Packet*, of Sydney, New South Wales. To this end the contracting parties agreed "to invite the government of a third power to select from its subjects a jurist of undoubted repute" to act as arbitrator. An invitation was accordingly extended to the Government of Russia, which named as arbitrator Mr. F. de Martens.

The original claim, as laid before the British Government through the Government of New South Wales, amounted to £25,000, of which £10,000

<sup>1</sup> Mr. Durham to Mr. Foster, No. 102, dip. series, July 22, 1892, MSS. dispatches from Hayti.

<sup>2</sup> For. Rel. 1871, 487; Mr. J. C. B. Davis, Acting Secretary, to Mr. Boker, September 29, 1871; Mr. Fish, Sec. of State, to Mr. Boker, October 14, 1871; Mr. Fish to Mr. Beale, Nov. 3, 1871, MSS. Dept. of State.

<sup>3</sup> Mr. Thompson, Sec. of the Navy, to the Sec. of State, February 28, 1879, MS.

<sup>4</sup> Mr. Hunter, Acting Secretary, to Mr. Thompson, October 6, 1879, MS. Dom. Let. CXXX. 145; Mr. Frelinghuysen, Sec. of State, to Mr. Chandler, February 2, 1883, MS. Dom. Let. CXLV. 424; For. Rel. 1879, 717.

<sup>5</sup> Br. and For. State Papers, LVI. 7.



were demanded for the master of the ship, £10,000 for the owners, and £5,000 for the crew. May 17, 1893, the British minister at The Hague was instructed to ask for £2,500 as personal compensation for Captain Carpenter, with the understanding that if this should be allowed no claim on the part of the owners or the crew would be put forward. This step was, it seems, taken without reference to the government of New South Wales, and when it became known an agitation was started in the colony against the action of the imperial government, and a select committee of the colonial parliament was appointed for the purpose of obtaining more detailed evidence in the case. The finding of this committee was indorsed by all the Australian colonies through their agents general and by Canada through her high commissioner in London. As the result of these measures, the British minister at The Hague was instructed to accept an offer which had been made by the Netherlands Government to arbitrate the claim of Captain Carpenter, if that government would consent also to refer the original claim of the master, owners, and crew, as was finally done.<sup>1</sup>

In the papers presented to the arbitrator, it was stated, on the part of the British Government, that on January 24, 1888, there was sighted from the *Costa Rica Packet* what at first appeared to be a log, but was afterwards ascertained to be a water-logged derelict prauw (native Malayan boat) of about a ton burden. At the time the *Costa Rica Packet*, according to the entries of latitude and longitude in her log, was about thirty-two miles from the nearest land. Two boats were put off, which, finding goods on board of the prauw, towed her alongside of the ship, where there were transferred from the prauw to the deck of the *Costa Rica Packet* ten cases of gin, three cases of brandy, and a can of kerosene oil. The prauw was then cast loose, being of no value. The brandy and gin were damaged by sea water; but the crew of the ship, by a too free indulgence in them, soon became drunk and got to fighting and Captain Carpenter ordered the whole of the spirits to be thrown overboard. This was done except as to a small quantity which the crew secreted in the ship's hold.

After this incident the *Costa Rica Packet* continued her cruise. From February 18, 1888, to the third of the next month, she was in the port of Batjan, in the Netherlands Indies. The authorities there were, as the British Case stated, informed of the finding of the prauw and of the taking of its contents. The *Costa Rica Packet* was subsequently in other Dutch ports, in 1888 as well as in 1889 and 1890. On the night of November 1, 1891, being again on a whaling cruise, she entered the port of Ternate, Netherlands Indies, to obtain provisions. Here Captain Carpenter was arrested and sent to Macassar, 1,000 miles distant, on a charge of theft, in having seized the prauw and maliciously appropriated the goods in it. He was imprisoned at Macassar till November 28, 1891, when he was released through the intervention of the governor of the Straits Settlements. In the warrant of arrest it was charged that the alleged criminal act was committed not more than three miles from the island of Boeroe, residence of Amboyna. The evidence, however, showed that it was at least fifteen or twenty miles from land.

On the facts thus averred the British Case maintained that the whole

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<sup>1</sup> London Times, December 26, 1894.

transaction "occurred on the high seas and outside Netherland's territorial waters;" that the acts in question, being "done on the high seas by British subjects belonging to a British ship sailing under the British flag, and owned by British subjects," and "actually upon a British ship or upon her boats, and operating immediately therefrom," were "done within the exclusive jurisdiction of the British Government and British law and must be judged accordingly;" that the laws of a state "have no application to foreigners beyond the territorial limits of that state," and that "in ships on the high seas no one is subject to any jurisdiction but that of his own country or of the country to which the ship belongs."<sup>1</sup> The British Case also maintained that "the prauw and its contents, being found derelict on the ocean, both were properly the subject of salvage at the hands of the master and crew of the *Costa Rica Packet*;"<sup>2</sup> and that Captain Carpenter could not, upon the facts in the case, have been, according to British law, guilty of theft.

On the whole the British Case maintained that the proceedings against Captain Carpenter were destitute of reasonable cause and oppressive, and demanded damages as follows: For the crew, £8,000, which represented their share of the prospective profits; for the owners, £16,094 18s. 10d., representing expenses and loss of anticipated profits; for Captain Carpenter, £7,500, including £2,000 for loss of profits, £500 for expenses in defense and in traveling, and £5,000 for "the arrest and imprisonment, the indignities, mental pain, and anxiety suffered, the loss and injury to his reputation, health, and credit, loss of time, etc."

The Dutch Government in reply quoted from an opinion of the law officers of the Crown, communicated by the under secretary of state for the colonies to the agent general of New South Wales in London, to the effect that there was in the arrest and detention of Captain Carpenter "nothing so contrary to the practice of civilized nations as to enable Her Majesty's Government to found thereon a claim for compensation;" that Her Majesty's Government "should not put forward any claims for compensation which they would not be prepared to entertain on behalf of foreigners," and that that government had no right "to question in the case of British subjects the sufficiency or expediency of the system of criminal law adopted by a friendly nation for the governance, within its dominions, of all persons alike."<sup>3</sup>

Although the law officers, starting from another basis, arrived at "a slightly different conclusion" with reference to the claim of Captain Car-

<sup>1</sup> Citing Story, Conflict of Laws, 8th ed., sec. 539; F. de Martens, *Traité de Droit Int.*, secs. 4, 78, 88, 96, 97; Bluntschli, *Das Moderne Völkerrecht*, secs. 317, 318, 339; Le Louis, 2 Dodson, 243; Phillimore, *Int. Law*, 3d ed. I. 458; Rose v. Himely, 4 Cranch, 279; Wheaton, *Dana's ed.* 133, 169; Halleck, *Int. Law*, I. 206-7, 215; Twiss, *Law of Nations*, Chap. X. secs 157-8; Hall, *Int. Law*, 4th ed. 51, 264.

<sup>2</sup> The Aquila, 1 Chr. Robinson, 37; The King in his office of Admiralty v. Property Derelict, 1 Haggard's Adm. 383.

<sup>3</sup> This opinion of the law officers was given on the case originally presented by the government of New South Wales, and before the investigation and report of the select committee of the colonial parliament were made.

penster personally, the above-mentioned words were, said the Dutch Reply, sufficient to condemn the entire claim. The Dutch Reply stated that Captain Carpenter was arrested on November 2, 1891, by virtue of a decision of the court of justice at Macassar of January 26, 1891. By this decision Carpenter was ordered to be arrested and prosecuted for the alleged theft in 1888. He was sent to Macassar on the 6th of November, and arrived there on the 16th. The depositions of different persons had given rise to the "presumption" that he committed the crime with which he was charged. By the law in force in the Netherlands Indies, the court of justice, in the ordinary course of procedure, made preliminary inquiries in order to decide whether leave to prosecute should be granted, and then, if such leave was given, instituted a preliminary investigation (*instruction*) in order to decide whether there was ground to refer the matter to the court for a hearing and trial, or whether the complaint should be dismissed on the ground of insufficiency of the presumptions or on any other ground. November 28, 1891, the magistrate at Macassar moved the court of justice to decide that there was no ground for bringing Carpenter to trial, and that he should be liberated on the ground that the interrogatories showed that at the time when the goods taken out of the prauw were appropriated the vessel was more than three miles from the coast. On this motion Carpenter was liberated twelve days after his arrival. The proceedings were in accordance with law. If the judicial authorities at Macassar were to be reproached, it should be because they held themselves to be incompetent in the matter, although there was reason to contend both that the goods had been stolen from on board a Netherlands Indian vessel, and that some of them were afterwards sold or exchanged on Netherlands Indian territory.

But, even assuming, said the Netherlands Reply, that the court correctly decided that it was incompetent to deal with the act charged, there would be no ground for a claim of indemnity. No indemnity could be claimed by the subjects of the state, either in the Netherlands or in Great Britain, "on the sole ground that the presumptions were not sufficient to warrant arrest." Neither, therefore, could a foreigner establish such a claim.<sup>1</sup> The Netherlands Reply also suggested that even if the act charged had taken place more than three miles from the shore, it did not follow that it was committed outside of territorial waters; that such waters were restricted to a distance of three miles from the shore only when that limit was fixed by law or by an international convention, and that the extent of jurisdiction might be established on the basis of the well-known proposition of Bynkershoek—"Terrae dominium finitur ubi finitur armorum vis." In further support of the right of the Netherlands Indies authorities to inquire into the case, a charge of crime within their jurisdiction having been presented to them, the Dutch Reply referred to Pradier-Fodéré, *Traité de Droit International Public*, V. 534-536.

The British Government in a new memorandum, in answer to the Dutch

<sup>1</sup> F. de Martens, *Traité de Droit International*, I. 447-448; Pasquale Fiore, *Nuovo Diritto Internazionale*, I. secs. 648, 649, 678; Pradier-Fodéré, *Traité de Droit International Privé*, I. sec. 200; Funck-Brentano et Sorel, *Précis du Droit des Gens*, 226; Stoerk in v. Holtzendorff, *Encyclopædie der Rechtswissenschaften*, 1300, sec. 38.

Reply, contended that upon the proofs submitted by the Dutch Government there was no evidence before the colonial authorities to make out such a case of reasonable suspicion as would have justified Captain Carpenter's arrest; that the statements of the witnesses who were examined prior to the issuance of the order of arrest were altogether inconsistent with the assertion that the prauw was more than three miles from land, and failed to establish the identity between the prauw found and the prauw lost; and that the statement of the Dutch Government that there was no remedy for Captain Carpenter under its municipal law only proved the necessity of intervention by the British Government, and the international obligation of the Netherlands Government to repair the wrong which was actually done.

The arbitrator rendered the following award:

[Translation.]

"In virtue of the high duties of arbitrator conferred by supreme order of my august master, His Majesty the Emperor Nicholas II. of All the Russias, F. de Martens, privy councillor, permanent member of the council of the Russian ministry of foreign affairs, and emeritus professor, in accordance with the convention of the 16th May 1895, concluded between the Government of Her Majesty the Queen of Great Britain and Ireland, Empress of India, and the Government of Her Majesty the Queen of the Netherlands, on the subject of the difference which has arisen between the two governments in respect of the detention of Mr. Carpenter, captain of the Australian whaler the *Costa Rica Packet*—

"Having duly examined and maturely weighed the documents which have been produced on either side with regard to the indemnity claimed by the Government of Her Britannic Majesty from the Government of the Netherlands on behalf of Captain Carpenter, and the officers, crew, and owners of the vessel *Costa Rica Packet*—

"Animated by a sincere desire to justify the great honor which has been conferred on me by an impartial and scrupulous decision, and taking into account the principles of international law applicable to the dispute which has arisen between the two high contending governments, in order to fix the amount of the indemnity due by the Government of the Netherlands on account of the damages suffered personally by Captain Carpenter, of the *Costa Rica Packet*, as well as those that may be proved to have been suffered by the officers, crew, and owners of the aforesaid vessel, as a necessary consequence of the precautionary detention of Mr. Carpenter,

"I pronounce the following award of arbitration:

"Considering that the right of sovereignty of the state over territorial waters is determined by the range of cannon measured from the low-water mark;

"That on the high seas even merchant vessels constitute detached portions of the territory of the state whose flag they bear, and, consequently, are only justiciable by their respective national authorities for acts committed on the high seas;

"That the state has not only the right but even the duty of protecting and defending its nationals abroad by every means authorized by international law, when they are subjected to arbitrary proceedings or injuries committed to their prejudice;

"That the sovereignty of the state and the independence of the judicial or administrative authorities could not prevail to the extent of arbitrarily suppressing the legal security, which ought to be guaranteed no less to foreigners than to natives in the territory of every civilized country;

"Whereas the prauw, floating derelict at sea, and taken possession of in January 1888 by Mr. Carpenter, the captain of the *Costa Rica Packet*, was seized by him incontrovertibly outside the territorial waters of the Dutch Indies;

"Whereas the appropriation of the cargo of the aforesaid prauw by Mr. Carpenter having taken place on the high seas was only justiciable by English tribunals, and in nowise by Dutch tribunals;

"Whereas even the identity of the above-mentioned derelict with the lost prauw belonging to M. Frieser is in nowise proved;

"Whereas the authorities of the Netherlands Indies, who had arrested Mr. Carpenter in November 1891 on the charge of his having committed the act in 1888 outside the territorial waters of the Netherlands Indies, abandoned of their own accord, by the decision of the Macassar council of justice, dated the 28th November 1891, the prosecution of the accused, and irrefutably established by this action the illegality of his detention, as well as of his forced transference from Ternate to Macassar;

"Whereas all the papers and deeds produced go to prove the absence of any real cause for arresting Mr. Carpenter, and confirm his right to be indemnified for the losses sustained by him;

"Whereas the treatment to which Mr. Carpenter was subjected in prison at Macassar appears to be unjustifiable in view of his being the subject of a civilized state, whose detention was only a precautionary measure, and that, consequently, this treatment entitles him to a fair compensation;<sup>1</sup>

"Whereas the unjustifiable detention of Captain Carpenter caused him to miss the best part of the whale-fishing season;

"Whereas, on the other hand, Mr. Carpenter, on being set free, was in a position to have returned on board the ship *Costa Rica Packet* in January 1892 at the latest, and whereas no conclusive proof has been produced by him to show that he was obliged to leave his ship until April 1892 in the port of Ternate without a master, or, still less, to sell her at a reduced price;

"Whereas the owners or the captain of the ship being under an obligation, as a precaution against the occurrence of some accident to the captain, to make provision for his being replaced, the mate of the *Costa Rica Packet* ought to have been fit to take the command and to carry on the whale-fishing industry;

"And whereas, thus, the losses sustained by the proprietors of the vessel *Costa Rica Packet*, the officers, and the crew, in consequence of the detention of Mr. Carpenter, are not entirely the necessary consequence of this precautionary detention;

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<sup>1</sup> Mr. Carpenter, as stated in the British Case, was, on his arrival at Macassar, "placed in gaol after being subjected to public and gross indignities, and imprisoned in a cell for 'condemned Europeans.'"

It seems that Mr. Carpenter was an American by birth, who had been naturalized in the British dominions. (Mr. Quinby to Mr. Gresham, June 28, 1894, MS. Despatches from the Netherlands.)

"Whereas, in so far as the indemnity to be paid to Captain Carpenter, the officers, crew, and owners of the vessel *Costa Rica Packet* is concerned, the documents produced, and, in particular, the expert opinion to which recourse has been had at Brussels, do not furnish the necessary elements for fixing the amount, and whereas a sufficient indemnity will have been given them by granting the sum of 3,150*l.* to Captain Carpenter, the sum of 1,600*l.* to the officers and crew, and the sum of 3,800*l.* to the owners of the vessel *Costa Rica Packet*—

"For these reasons:

"I declare the Government of Her Majesty the Queen of the Netherlands responsible, and I, consequently, fix the indemnity to be paid at—

"The sum total of 3,150*l.* to Captain Carpenter.

"The sum total of 1,600*l.* to the officers and crew.

"The sum total of 3,800*l.* to the owners of the vessel *Costa Rica Packet*—

"With interest on all these damages at the rate of 5 per cent per annum, from the 2nd November 1891, the date of the illegal arrest of Captain Carpenter, and I put the expenses at the total sum of 250*l.*, to be paid by the Government of Her Majesty the Queen of the Netherlands.

"Done at St. Petersburg, in duplicate, the 13th (25th) February, 1897.

"MARTENS."

March 3, 1897, the Dutch minister at London transmitted to the British Government, in payment of the foregoing award, the sum of 11,082*l.* 7*s.* 6*d.*, the receipt of which was on the same day duly acknowledged.

**Great Britain and Nicaragua.**—Award of the Emperor of Austria as to the interpretation of the treaty of Managua.<sup>1</sup>

[Translation.]

"We, Francis Joseph the First, by the grace of God, Emperor of Austria, King of Bohemia, &c., and Apostolic King of Hungary:

"Whereas the Government of Her Britannic Majesty and the Government of Nicaragua have consented to submit to our arbitration the question in dispute between them of the interpretation of certain articles of the treaty of Managua, signed on the 28th January 1860, and whereas we declared ourselves willing to accept the office of arbitrator in this matter, we have come to the following decision, based on one of the three legal opinions which were drawn up and submitted to us at our request:

"ARTICLE I. The sovereignty of the Republic of Nicaragua, which was recognized by Articles I. and II. of the Treaty of Managua of the 28th January 1860, is not full and unlimited with regard to the territory assigned to the Mosquito Indians, but is limited by the self-government conceded to the Mosquito Indians in Article III. of this treaty.

"ARTICLE II. The Republic of Nicaragua, as a mark of its sovereignty, is entitled to hoist the flag of the Republic throughout the territory assigned to the Mosquito Indians.

<sup>1</sup> See Mr. Evarts, Sec. of State, to Mr. Kasson, MS. Inst. to Austria, August 1, December 18, and December 26, 1879, and June 4, 1880. This award and the accompanying opinion have become obsolete as the result of the formal and voluntary incorporation of the Mosquito Indians into the Republic of Nicaragua. (For. Rel. 1894, App. I. 354-363.)

"ARTICLE III. The Republic of Nicaragua is entitled to appoint a commissioner for the protection of its sovereign rights throughout the territory assigned to the Mosquito Indians.

"ARTICLE IV. The Mosquito Indians are also to be allowed to hoist their flag henceforward, but they must at the same time attach to it some emblem of the sovereignty of the Republic of Nicaragua.

"ARTICLE V. The Republic of Nicaragua is not entitled to grant concessions for the acquisition of natural products in the territory assigned to the Mosquito Indians. That right belongs to the Mosquito Government.

"ARTICLE VI. The Republic of Nicaragua is not entitled to regulate the trade of the Mosquito Indians, or to levy duties on goods imported into or exported from the territory reserved to the Mosquito Indians. That right belongs to the Mosquito Indians.

"ARTICLE VII. The Republic of Nicaragua is bound to pay over to the Mosquito Indians the arrears of the yearly sums assured to them by Article V. of the Treaty of Managua, which arrears now amount to 30,859 dol. 3 c. For this purpose the sum of 30,859 dol. 3 c., deposited in the Bank of England, together with the interest accruing thereto in the meantime, is to be handed over to the British Government. The Republic of Nicaragua is not bound to pay back-interest ("Verzugszinsen") on the sums in arrear.

"ARTICLE VIII. The Republic of Nicaragua is not entitled to impose either import or export duties on goods which are either imported into or exported from the territory of the free port of San Juan del Norte (Greytown).

"The Republic of Nicaragua is, however, entitled to impose import duties on goods on their conveyance from the territory of the free port of Greytown to the territory of the Republic, and export duties on their conveyance from the territory of the Republic to the free port of San Juan del Norte (Greytown).

"Given under our hand and seal at Vienna.

"FRANCIS-JOSEPH.

"JULY 2, 1881."

[Legal Opinion on which the Award was based—Translation.]

"In order to appreciate and settle the differences that have arisen between Her Britannic Majesty's Government and that of the Republic of Nicaragua respecting the interpretation of some articles of the treaty concluded by them at Managua on the 28th January 1860, it is necessary to recapitulate as succinctly as possible, in so far as they bear upon the declaration of the award, the complicated relations and the conflicting claims which existed before that treaty was drawn up and which led to its conclusion.

"(The following exposition, apart from the materials contained in the controversial documents of the two governments, is based upon the works cited below: Martens-Samwer, *Recueil Général de Traités*, Tome XV. pp. 158-250; Von Re den, *Das Mosquito-Gebiet*, in Petermann's *Geographischen Mittheilungen*, 1856, p. 250 sq.; Samwer, *Die Gebietsverhältnisse Centralamerika's*, ebenda, p. 257 sq.; Scherzer, *Wanderungen durch Nicaragua, Honduras, und San Salvador*, 1857; P. Lévy, *Notas Geográficas y Económicas sobre la República de Nicaragua*, Paris, 1873.)

"The rightful sovereignty over the territory inhabited by the Mosquito Indians on the east coast of Central America along the Caribbean Sea, but not exactly defined inland, had been long in dispute. On the one

side it was claimed by those republics which had broken loose from Spain in the third decade of the present century, and which founded their claim to the Mosquito territory upon their succession to the rights of the mother country. The Spanish Crown had claimed from of old the sovereignty over the Mosquito Indians, and this claim was expressly put forward by a decree in the year 1803 regulating the territorial demarcation and the administrative distribution of the coast territory. But as neither Spain nor the colonies which had fallen away from her and attained independence had actually exercised the pretended rightful sovereignty, and consequently the asserted occupation lacked the essential element of taking possession in fact, the Mosquito Indians were able to maintain not only their actual freedom, but also their legislative independence, and to act as a separate community. As such the Mosquito Indians entered into commercial and international relations, especially with England. The relations with that power reach back to the time immediately after the conquest of Jamaica, in the second half of the seventeenth century. They led, in the year 1720, to a formal treaty between the governor of Jamaica and the chieftain, styled 'king,' of the Mosquito Indians, and finally took the shape of international protection. This protectorate of England's was, however, contested not only by the Central American Republics, but also by the United States of North America, and all the more keenly inasmuch as the greatly coveted regions at the mouth of the River San Juan had acquired considerable importance in reference to commercial policy, owing to the intended construction of an interoceanic canal for the connection of the Atlantic and Pacific oceans.

"When the Mosquito Indians, by the aid of England, after several vicissitudes, had got possession, in the year 1848, of the important seaport town of San Juan del Norte (Greytown), at the mouth of the San Juan River, warlike complications threatened to break out with the United States, under whose protection the Republic of Nicaragua had placed itself. In order to avert these dangers, and to obtain a basis for a uniform policy of abstention on the part of England and of the United States in regard to the regions along the intended interoceanic canal, the two states concluded the so-called Bulwer-Clayton Treaty in April 1850 (Case, Appendix, pp. 69 sq.), which, however, became itself a starting point for fresh disputes. England now sought to obtain by negotiations with the United States the groundwork for an arrangement of Central American affairs, and especially for determining the fate of the Mosquito Indians, as well as the political position of the important seaport town of San Juan del Norte (Greytown), and with this view in the first place to secure definite results by a treaty with the United States, to which both states were to endeavor to get the adhesion of the Republic of Nicaragua. This was the origin of the so-called Crampton-Webster Treaty in April 1852 (Martens-Samwer, *Recueil de Traités*, Tome XV. pp. 195 sq.), wherein England tacitly renounced the protectorate of the Mosquito Indians, and by the provisions of which the whole of the Mosquito territory situated within the bounds of Nicaragua was to come under the sovereignty of the republic, but without any exact demarcation of the territory that should remain to the Mosquito Indians in absolute and independent sovereignty (Article I.). The grounds of this treaty were not, however, accepted by Nicaragua. The republic would not allow the Mosquito Indians even a partially inde-



pendent territory, but wished to see the whole coast placed under its sovereignty. As further negotiations with the United States did not attain the desired end, and as, in particular, a treaty concluded in the year 1856 (the so-called Clarendon-Dallas Treaty—Case, Appendix, pp. 72 sq.) was not ratified, England adopted the course of direct negotiations with the Republic of Nicaragua, and finally concluded the Treaty of Managua on the 28th of January 1860, which contains an adjustment of the conflicting interests and claims. For the historical comprehension and proper realization of that treaty, the previous treaty negotiations between England and the United States are not without importance.

“II. In the Treaty of Managua the protectorate over the Mosquito district was expressly given up by England (Article I. par. 2), the sovereignty of the Republic of Nicaragua over the whole district of the Mosquito Indians lying within its bounds was acknowledged under the conditions and engagements specified in the treaty (Article I. par. 1), whilst an exactly defined territory was assigned and reserved to the Mosquito Indians (Articles II. VIII.), within which they are to enjoy the right of self-government (Article III.).

“The dispute between the two governments refers to the connection with each other of the coexistent sovereignty and self-government, the purport and extent of the domination appertaining to the republic on the one side, and on the other the self-regulation conceded to the Mosquito Indians.

“An unprejudiced consideration of the case as it stands leads to the following results:

“The sovereignty over the whole region of the coast, always claimed by the Republic of Nicaragua, has been acknowledged by the treaty. The separation of a part of that region for the maintenance or constitution of an entirely independent community of the Mosquito Indians, absolutely free with respect to political and international relations, and such as was contemplated in the treaty negotiations between England and the United States, has not been carried out.

“In place of the international relation of protection heretofore existing a relation of political subjection has been created; the Mosquito Indians, in place of their former protector (England), have got a ruler (the Republic of Nicaragua), under whose political power and authority they are placed.

“But, on the other hand, an exactly defined territory is assigned to the Mosquito Indians, and they have still the right of self-government within it.

“The territory so reserved to the Mosquito Indians, and therefore usually called ‘Mosquito Reserve,’ forms an integral and inseparable component of the aggregate territory of the republic, a political appurtenance of the main country.

“In this region, closed and parted off, the Mosquito Indians have to lead their own life and provide for their own national existence. This territory, though permanently belonging to the Republic of Nicaragua, is to be considered as primarily and immediately a territory owned by Indians, as the country of the Mosquitos. This also follows indirectly from the prohibition against the cession of this tract of land by the Mosquito Indians to a foreign person or power (Article II. par. 3). The Mosquito Indians are not allowed to make over the dominion of their country to anyone else.

"Within and upon this territory the Mosquito Indians are allowed 'the right of governing according to their own customs and according to any regulations which may from time to time be adopted by them, not inconsistent with the sovereign rights of the Republic of Nicaragua, themselves and all persons residing within such district. Subject to the above-mentioned reserve, the Republic of Nicaragua agrees to respect and not to interfere with such customs and regulations so established, or to be established, within the said district.' (Article III.) When we come to examine and interpret this treaty stipulation impartially, we can hardly do otherwise than admit that the concession of self-government in the sense of self-legislation and self-administration is involved in it. This result necessarily follows also from the stipulation of Article IV., according to which the Mosquito Indians are not to be prevented at any time 'from agreeing to absolute incorporation into the Republic of Nicaragua on the same footing as other citizens of the republic, and from subjecting themselves to be governed by the general laws and regulations of the republic, instead of their own customs and regulations.' So long as this shall not have taken place, and the efforts of the Republic of Nicaragua in this respect have hitherto been fruitless, the Mosquito Indians have not been completely incorporated with the Republic of Nicaragua, they do not stand on the same footing as the other subjects of the republic, they are not amenable to the general laws and regulations of the republic, but they govern themselves according to their own customs and laws; until the date of such voluntary agreement *dies incertus an et quando*, the incorporation of the Mosquito district into the territory of the republic is a relative and incomplete incorporation. The Mosquito Indians are consequently in a peculiar position guaranteed to them in conformity with treaty; their territory is a district exempt from the legislation and administration of the republic, and forms an absolute legislative and administrative sphere of their own. This local self-government is the last remnant of the freedom and self-dependence claimed and exercised by the Mosquito Indians for centuries.

"This self-government can not, of course, extend to foreign affairs, inasmuch as the 'Mosquito Reserve' forms a political and international whole with the Republic of Nicaragua. The Mosquito Indians have, therefore, no right to enter into relations or conclude treaties with foreign states, or to send or receive envoys, or to wage war or make peace. But their self-government does extend, according to the general purport and conception of Article III., to the whole range of internal affairs, in the regulation of which the Republic of Nicaragua has undertaken not to interfere.

"The position which the Government of the Republic of Nicaragua takes up and seeks to maintain in its controversial writings can not be justified.

"The government of the republic denies that 'une autonomie véritable, une autonomie séparée du reste de la République' (Réponse, pp. 9, 12) was conceded to the Mosquito Indians. According to the view of that government its inherent sovereignty is absolute and entire ('pleine et absolue,' Réponse, pp. 4, 10), even in regard to the Mosquito district, and the republic is entitled to enforce its dominion to the full meaning and extent thereof even on the Mosquito soil ('d'être pratiquement souverain,' Exposé, pp. 4, 49-51, 63), to enjoy plenary use of paramount and governmental rights involved in sovereignty ('de nommer ses employés, d'ouvrir

des ports de mer, de déterminer les droits de Douane . . . en un mot, d'y établir comme dans toutes les autres parties de la nation, la constitution, et les lois de la République,' Réponse, p. 10), and has only to refrain from any encroachment on the national customs and municipal usages ('us et coutumes') of the Mosquito Indians (Exposé, pp. 5, 43; Réponse, p. 12).

"This assertion is in direct contradiction with Articles I-IV., wherein the sovereignty of the republic is recognized only in a limited form ('subject to the conditions and engagements specified in the present treaty'), and it is stipulated that the 'general laws and regulations of the republic' are not binding for the Mosquito Indians, to whom is conceded the right of governing, not only themselves, but all persons in general residing in Mosquitia. It is, moreover, in indirect contradiction with Article V., whereby the subvention from the republic is also granted for the maintenance of the government authorities of the Mosquitoes, 'for the maintenance of the authorities to be constituted under the provisions of Article III.' The assertion of the government of the republic contains a thoroughly gratuitous and unjustifiable anticipation of the absolute incorporation and complete equalization of the Mosquito Indians with the rest of the subjects of the republic, which is reserved in Article IV. for a future voluntary agreement.

"If the government of the republic declares its opinion that the tribe of Mosquito Indians is an exhausted and degenerate race, incapable of education and development, and that therefore the talents and presumptions required for self-government are lacking (Réponse, pp. 4, 9), it may be said on the other hand that impartial authors, well acquainted with the facts, are not altogether of that opinion; that the Republic of Nicaragua has promised the ten years' subvention for the purpose, amongst others, of promoting 'the social improvement' of the Mosquito Indians (Article V.); that they, in case of the absolute incorporation, so much striven for by the Republic of Nicaragua, are at once to enjoy the same rights as all other citizens of the republic (Article IV.); and that, according to the statement of their chief, a number of schools, etc., have already been established (Case, p. 52), whilst nothing has apparently been done for improving the position of those Mosquito Indians who live outside the reserved territory, and are completely incorporated with the Republic of Nicaragua. However that may be, this consideration ought at the time to have prevented the government of the republic from concluding the treaty of Managua on such grounds; it ought to have followed the example of the Republic of Honduras in its treaty with England, concluded at Comayagua on the 28th November 1859, wherein no separate territory was reserved for the self-government of the Mosquito Indians within the jurisdiction of that republic, but their absolute incorporation and immediate unconditional equalization with the rest of the subjects of the Republic of Honduras were definitely fixed. (Articles II. and III.)

"The appeal of the Nicaraguan Government to the legal status of the Indians within the United States of North America is likewise inapplicable. According to the evidence of Kent (Commentaries on American Law, 5th edition, 1844, vol. III., p. 378 sq.), the Indian tribes in North America have always been treated 'as free and independent tribes, governed by their own laws and usages, under their own chiefs, and competent to act in a national character and exercise self-government, and, while resid-

ing in their own territories, owing no allegiance to the municipal laws of the whites' (p. 384). They have occupied a position of protection under the United States, and have been considered and treated as 'dependent allies.' (Kent, pp. 383, 385; Wheaton, *Eléments de Droit International*, 1848, I., p. 50 sq.; Beach-Lawrence, *Commentaire sur les Eléments de Droit International de H. Wheaton*, 1868, I., p. 264 sq.; Calvo, *Le Droit International*, 3d edition, 1880, I., sec. 69, p. 178 sq.; Rittiman, *Das Nordamerikanische Bundesstaatsrecht*, I., 1867, p. 1 sq.). It is but quite lately that (3d March 1871) the Congress at Washington has decided that the Indian tribes are in future no longer to be regarded as independent nations, and that, without prejudice to the validity and operation of the treaties already concluded, no more treaties of alliance are to be concluded with them (Revised Statutes of the United States, 1873-74, sec. 2079, p. 366). Moreover, considering the diversity of geographical and ethnographical circumstances, it is quite impossible to draw a parallel. Whilst the Indian tribes in the United States live everywhere in inclosed districts and surrounded by an immense unmixed white population that overwhelms them, the Mosquito Indians (about 6,000 in number) inhabit a separated strip of coast, and the Republic of Nicaragua itself has but a feeble and mixed population (from 250,000 to 300,000 inhabitants, half Ladinos, one-third Indians, one-sixth mulattoes and blacks). (Martin, *The Statesman's Year-Book*, 1874, pp. 543, 544; Wappäus, *Handbuch der Geographie des Ehemaligen Spanischen Mittel- und Südamerika*, 1870, p. 335; Mayer, *Conversations-Lexicon*, 3d edition, Art. Nicaragua und Mosquito-Küste.) The result of the foregoing discussion and statement is that the Republic of Nicaragua's sovereignty over the district of the Mosquito Indians is not complete and unlimited, but that it is restricted and circumscribed by the right of self-government, conceded to the Mosquito Indians (Article I of the Draft<sup>1</sup>).

"This connection of the Republic of Nicaragua with the 'Mosquito Reserve' may be shortly described in the phrase '*La République règne, mais elle ne gouverne pas.*'"

"It must be acknowledged at once that the Republic of Nicaragua, as a sovereign of the Mosquito district, is entitled to hoist the flag of the republic as a sign of its dominion ('*en signe de souveraineté*') in the territory of the Mosquito Indians (Draft, Article II.). Nor does the the English Government oppose this claim of the government of the republic (Exposé, p. 55; Counter Case, p. 8, No. 16), although it forms an item of complaint in the memorial of the chieftain of the Mosquito Indians (Case, p. 52). It must likewise be acknowledged that the Republic of Nicaragua has the right to appoint a commissioner, who has to see that the Mosquito government does not go beyond its province and encroach upon the sov-

<sup>1</sup> "P. Lévy says much the same in his work, *Notas Geográficas y Económicas sobre la República de Nicaragua* (Paris, 1873), published with the approval and pecuniary aid of the Nicaraguan Government. His observation, p. 400, is: "In regard to Nicaragua, by the *Managua convention* she has taken the place of England in the protectorate of the Mosquitoes, but on the express condition that they shall acknowledge her sovereignty. The former King of Blewfields, or his lawful successors, retain a purely administrative authority over the jurisdiction that we have indicated above" (i. e., the Mosquito Reserve)."

ereign rights of the republic (Article III.; Draft, Article III.). But this commissioner must not meddle with the internal affairs of the Mosquito Indians, or exercise any jurisdiction in the Mosquito district. In so far as the Nicaraguan presidential decree of the 6th January 1875 (Case, p. 82) is in contradiction with this, it must therefore cease to take effect.

"The Mosquito Indians can not well be forbidden from using their old flag still. But they must connect therewith a sign of the sovereignty of the Republic of Nicaragua, to which they are subject, in order that this connection with the paramount authority may be generally recognizable (Draft, Article IV.). This is the more imperative, inasmuch as even states which only exercise a protectorate have insisted that the protected state should exhibit a sign on its flag denoting the protective connection ('as a mark of the protection').

"Thus, the Ionian Islands, so long as they were under the protectorate of England, had to indicate that connection on their flag (Phillimore, Commentaries upon International Law, I. p. 96, sq.).

"III. Self-administration comprises in itself the people's own administration of their economical affairs. It is just where material interests are concerned that the right of self-government assumes special practical importance.

"The Mosquito Indians have to provide from their own means for all the requirements of their separate national existence and all the costs of their self-government. They have to procure those means for themselves, and can only derive them from the natural produce of their territory and the most profitable disposal thereof. The cession to them of a territory of their own naturally includes the right of employing it to their own advantage. In consequence of the separate territorial and governmental position conceded to the Mosquito Indians, the district reserved to them forms a department economically dependent upon itself.

"As a necessary consequence of this, the Mosquito government must have the right of granting licenses for the acquisition of the natural products of its territory (wood, caoutchouc, gum, cocoanuts, minerals, etc.) and that of levying dues on such products.

"It would be against the universal principles of justice that he to whom the ground belongs should not be entitled to reap the produce of it himself or to transfer the collection of such produce to others for a consideration. The utilization of the Mosquito soil can but belong to the Mosquitoes only; therefore the Republic of Nicaragua can not be considered as entitled '*de délivrer des patentes pour l'exploitation des produits naturels de la Mosquitia*,' and thus deprive the Mosquitoes of their source of revenue (Draft, Article V.). The pretension to such a right on the part of the government of the republic (Exposé, p. 49, sq.) rests upon a confusion of the political idea of a sovereignty with the notion of a private right of ownership.

"As the Mosquito Indians constitute a community endowed with its own self-government, under the dominion of the Republic of Nicaragua, they must be considered as also entitled to carry on their trade according to their own regulations (Article III.), and if they should deem it expedient, for the purpose of creating a revenue, to levy duties on goods that are imported into or exported from their district, they may do so.

"If the government of the Republic of Nicaragua claims these rights

for the republic 'en sa qualité de souverain,' and asserts its privilege 'de réglementer le commerce extérieur de la "Reserva Mosquita," de réglementer le cabotage, d'ouvrir et de fermer ceux des ports pour lesquels l'une ou l'autre de ces mesures lui paraît opportune' (Exposé, pp. 51, 63), 'd'imposer les droits généraux d'importation et d'exportation dans le territoire de la reserva' (Exposé, pp. 52, 53), this is only a consequence of its radically erroneous notion that the Republic of Nicaragua is entitled to the full and unlimited exercise of the rights of sovereignty even over the Mosquito territory. The assertion that the republic has a right 'd'appliquer dans le territoire de la reserva les droits généraux qui régissent les autres parties de la république' (Exposé, p. 63) is altogether contrary both to Articles III. and IV. of the treaty, whereby the 'general laws and regulations of the republic' are not binding in the Mosquito district, and to the right of self-government guaranteed to the Mosquitoes, for that undoubtedly comprises the exclusive right of self-taxation, both direct and indirect.

"In justification of its claim to impose a duty on goods imported into Greytown and intended for consumption in the Mosquito district on their reexportation by sea from that port, the government of the Republic of Nicaragua appeals to the final clause of Article VII., whereby the constitution of San Juan del Norte (Greytown) as a free port is not to prevent the Republic of Nicaragua from levying the usual duties on goods intended for consumption within the territory of the republic; for, as the Mosquito district also belongs to the territory of the republic, the latter must therefore be entitled to levy a duty on the goods exported to Mosquitia from the free port Greytown (Exposé, pp. 52, 53; Réponse, p. 18). But the words 'territory of the republic,' in the final clause of Article VII., which does not refer at all to the connection of Nicaragua with Mosquitia, can not, any more than in Article V., paragraph 2, bear the signification of the whole territory of the republic; they are only to be understood as the proper territory of the republic, exclusive of the 'territory reserved for the Indians' (Article VIII.). Moreover, the levying of a duty is incompatible with the free port character of Greytown (No. V.).

"The apprehension of the government of the Republic of Nicaragua that the duty-free importation of goods into the Mosquito district would cause or encourage smuggling in the other parts of the republic (Exposé, p. 51) is met by Her Britannic Majesty's Government with the objection that the frontier parts of the Mosquito district are quite impassable (Counter Case, p. 28, No. 93). Were this not the case, the Republic of Nicaragua would have no alternative but to establish an immediate customs line. The difficulty or impracticability of such an undertaking can not derogate from the right of the Mosquito Indians as once for all settled by the Treaty of Managua.

"It must therefore be allowed that the Republic of Nicaragua is not entitled to regulate the trade of the Mosquito Indians, or to levy import or export duties on goods which are imported into or exported from the Mosquito district (Draft, Article VI.) Articles I. and II. of the Nicaraguan presidential decree of 4th October 1864 (Case, p. 82), which are in contradiction with this, must consequently cease to take effect.

"IV. In Article V. of the Treaty of Managua the Republic of Nicaragua undertook to pay the Mosquito Indians an annuity of \$5,000 for the term

of ten years, for the purpose of improving their social position and of maintaining their government authorities constituted in virtue of Article III. This annuity was to be paid half-yearly at Greytown to a person empowered by the chieftain of the Mosquitoes to receive it, and the first installment was to be paid six months after the exchange of ratifications of the Managua Treaty. This said exchange was effected on the 2d August 1860, in London.

"The payment of the annuity was irregular, and soon ceased altogether. When, in November 1865, the chieftain of the Mosquito Indians died, and his cousin, a boy of 11 years old, was proclaimed his successor, the Republic of Nicaragua refused to recognize him. It is not necessary to inquire here whether there were good grounds for the refusal, or whether it was to serve as a welcome pretext for withholding the payments of the subvention. The said chieftain afterward died (since 1875), and no objection has been raised against the legitimacy of his successor. Now, as the objects for the attainment of which the subvention was promised are still the same as they were before, and as the payment thereof is attached to no conditions whatever, there can be no doubt that the Republic of Nicaragua must be declared liable for the payment of the arrears to the amount of \$30,859.03. This sum has meanwhile been deposited by the Republic of Nicaragua in the Bank of England on condition (Case, p. 78) that upon the delivery of an award for payment it is to be made over to the British Government for the benefit of the Mosquito Indians (Draft, Article VII.).

"When the Government of the Republic of Nicaragua intimates the desire to have the sum deposited in the Bank of England paid over to itself, in order that the said sum may be duly applied for the benefit of the Mosquito Indians, inasmuch as no one can be in a better position to judge of what is to be done than '*le Souverain dans ses domaines, et que le territoire de Mosquitia se trouvant dans les limites et sous la juridiction de la République, il est de son devoir de s'enquérir de ses besoins pour y subvenir autant que possible, prélevant toutes les mesures qui peuvent contribuer à l'avancement moral et au progrès matériel de ce district*' (Réponse, p. 16), it first of all overlooks the fact that the subvention is not only to serve for the improvement of the social position of the Mosquitoes, but also for the maintenance of their own government authorities. The Nicaraguan Government hereby seeks, in a way that is radically inadmissible, to take the place of the Mosquito government, whose own business is independently to attend to and provide for the concerns and interests of the Mosquitoes. For even in the treaty which the Republic of Honduras concluded with Great Britain at Comayagua on the 28th November 1859 it was stipulated that the ten years' subvention of \$5,000 a year to be furnished by the said republic for the improvement of the intellectual and material position of the fully incorporated Mosquitoes should be paid to their chieftain (Article III, par. 2).

"The Republic of Nicaragua, however, can not be called upon to pay back-interest on the subvention sum in arrear. The subvention is not, indeed, as the Government of the Republic of Nicaragua intimates (Réponse, p. 18), a pure donation ('*un don gratuit, un présent*'), inasmuch as it was more properly promised 'in consideration' of the manifold advantages which were secured to the republic in the treaty and have

accrued therefrom, such as the relinquishment of the protectorate on the part of England, and the recognition of the republic's sovereignty over the whole Mosquito district, including the town of San Juan del Norte (Greytown). But, though the subvention has not the character of a pure donation, still it has the character of remunerating liberality, and the equitable nature of such an obligation precludes the liability for the payment of back-interest (Draft, Article VII.).

"V. As is generally acknowledged in theory and practice, the essence of a free port consists in this, that all goods imported and exported therein free and without payment of duty remain within the jurisdiction of the port itself, either to be sold or consumed there, or to be again exported therefrom to a place in the interior or abroad. A free port, which belongs to the territory of a certain state, and therefore is under the sovereignty of that state, is to be looked upon in regard to the customs just as a foreign country. But so soon as the goods are imported from the jurisdiction of the free port into the other part of the state territory, they may, on their entry into this territory, and consequently passing beyond the jurisdiction of the free port, be charged with an import duty. It is only in this sense that the concluding words of Article VII. of the Treaty of Managua can be understood; they are set in their true light by the stipulation immediately preceding, whereby the Republic of Nicaragua is not to be allowed to levy transit dues on goods which pass from sea to sea through the territory of the republic on the projected interoceanic canal. In like manner the goods exported from inland ('les articles du pays') can not indeed be charged with an export duty when they go out of the free port, but they can be so charged on their passage from the state territory into the jurisdiction of the free port (Draft, Article VIII.). The Nicaraguan presidential decree of the 22d June 1877 (Case, pp. 92, 93), which contradicts these principles, and which has already been suspended, for so long as the dispute is pending, by presidential decree of the 10th April 1878 (Case, pp. 93, 94), for San Juan del Norte (Greytown), must therefore definitively cease to take effect for that free port.

"Inasmuch as no duties at all may be levied on goods in a free port, it is equally unallowable to levy duties on imported or exported goods for the purpose of meeting the costs of the administration of the port town and of the maintenance of the free port. The means for covering such local requirements must be raised by local taxation in other forms, as, for example, by levying a tax upon the consumption of goods imported duty free. The system of providing for the costs of the administration of the town and the maintenance of the free port of Greytown, introduced by presidential decree of the 20th February 1861 (Case, pp. 88, 89), by an import duty on the goods imported there, will therefore have to make room for some other system.

"There is no dispute about the right of the Republic of Nicaragua to levy 'duties and charges' on ships in the free port of San Juan del Norte (Greytown) for the purposes of the port (Article VIII.).

"Upon the other points brought forward by Her Britannic Majesty's Government for decision (Counter Case, pp. 32, 33, Nos. 15-19) it is not expedient to enter, inasmuch as some of them relate partly to administrative affairs and to reclamations in civil law by private persons, while, in



regard to others, the necessary statistical materials and particulars of account are not within reach.

"VI. The Government of the Republic of Nicaragua disputes the right of Her Britannic Majesty's government to take part in the affairs relating to the Mosquito Indians and to the free port of San Juan del Norte (Greytown), or to come forward as complainant in the present litigation, inasmuch as such a proceeding would involve an unauthorized intermeddling with the internal concerns of Nicaragua, and a reassertion contrary to treaty of the relinquished protectorate over Mosquitia (Exposé, pp. 53, 54, 63; Réponse, pp. 16, 17).

"This contention against England's *legitimatio ad causam* can not be pronounced well founded.

"Then, in regard to the port of San Juan del Norte (Greytown), the Republic of Nicaragua, in Article VII. of the Managua Treaty concluded with England, undertook the engagement to constitute and declare it a free port; and such constitution and declaration did ensue by presidential decree of the 23d November 1860 (Case, p. 87). But England has a treaty right to insist also that that constitution and declaration should not be merely nominal, but that the Government of the Republic of Nicaragua should not enact any provisions and regulations incompatible with the essence and character of a free port. Now, if English merchants, settled in Greytown or trading thither, appeal to the protection and interposition of the English Government against measures on the part of the Nicaraguan Government which are prejudicial to the free port character of Greytown, and thereby to their commercial interests, and if subjects of other states join in such steps, there would be nothing herein contrary to the rules of international law or to the ordinary practice generally acknowledged as admissible.

"In regard, however, to the affairs of the Mosquito Indians, it is true that England, in the Treaty of Managua, has acknowledged the sovereignty of Nicaragua and renounced the protectorate, but this still only on condition, set forth in the treaty, of certain political and pecuniary advantages for the Mosquitoes ('subject to the conditions and engagements specified in the treaty, Article I.') England has an interest of its own in the fulfillment of these conditions stipulated in favor of those who were formerly under its protection, and therefore also a right of its own to insist upon the fulfillment of those promises as well as of all other clauses of the treaty. The Government of Nicaragua is wrong in calling this an inadmissible 'intervention,' inasmuch as pressing for the fulfillment of engagements undertaken by treaty on the part of a foreign state is not to be classified as intermeddling with the internal affairs of that state, which intermeddling has unquestionably been prohibited under penalty. No less unjustly does the Government of Nicaragua seek to qualify this insistence on treaty claims as a continued exercise of the relinquished protectorate, and on that ground wish to declare England's interposition inadmissible.

"Finally, the Government of the Republic of Nicaragua also expresses the desire (Réponse, p. 17) that the award should declare that the Treaty of Nicaragua [Managua], as having accomplished its purpose, is annulled in respect of Mosquitia, and that in future the parties concerned are bound in this respect to comply solely with the decisions adopted and enumer-

ated in the award. This desire militates against universal principles of law, and therefore can not be acceded to. The interpretation of a treaty can never supersede the treaty interpreted, and the judicial decision creates no new right, but only affirms and establishes the existing right.'

**Great Britain and Nicaragua.**—By a convention signed at London November 1, 1895, it was agreed to constitute a mixed commission "to fix the amount due to British subjects in respect of injury caused to them or their property or goods in the Mosquito Reserve, owing to the action of the Nicaraguan authorities in the course of the year 1894." It was provided that the commission should be composed of a British representative, who must be well acquainted with the Spanish language; a Nicaraguan representative, who must be well acquainted with English; and "a jurist, not a citizen of any American state." Should the two governments be unable to agree on this jurist he was to be named by the President of the Swiss Confederation. The commissioners were to sit in Bluefields, and to decide the claims before them "in accordance with the principles of international law and the practice and jurisprudence established by such analogous modern commissions as enjoy the best reputation." By a protocol annexed to the convention, it was provided: "Her Majesty's government will not support the claim of any person before the commission unless they consider him to be a British subject; and, on their part, the Nicaraguan Government will accept such status as duly established, subject to the production by them of proof that the claimant is not entitled to it in contemplation of English law."<sup>1</sup>

**Great Britain: Boundary of the Province of Ontario.**—Award of the arbitrators appointed to define the north and west boundary of the province of Ontario.

"To all to whom these presents shall come: The undersigned having been appointed by the governments of Canada and Ontario as arbitrators to determine the northerly and westerly boundary of the province of Ontario, do hereby determine and decide that the following are and shall be such boundaries, that is to say: Commencing at a point on the southern shore of Hudson Bay, commonly called James Bay, where a line produced north from the head of Lake Temiscaming would strike the said south shore; thence along the said south shore westerly to the mouth of the Albany River; thence up the middle of the said Albany River, and of the lakes thereon, to the source of the said river at the head of Lake St. Joseph; thence by the nearest line to the easterly end of Lac Seul, being the head waters of the English River; thence westerly through the middle of Lac Seul and the said English River to a point where the same will be intersected by a true meridional line northerly from the international monument placed to mark the most northwesterly angle of the Lake of the Woods by the recent boundary commission, and thence due south, following the said meridional line to the said international monument; thence southerly and easterly, following upon the international boundary line between the British possessions and the United States of America into Lake Superior. But if a true meridional line drawn northerly from the

<sup>1</sup>For. Rel. 1896, 307. See, as to the events out of which the claims in question grew, For. Rel. 1894, Appendix I. 234-363.

said international boundary at the said most northwesterly angle of the Lake of the Woods shall be found to pass west of where the English River empties into the Winnipeg River, then and in such case the northerly boundary of Ontario shall continue down the middle of the said English River to where the same empties into the Winnipeg River, and shall continue thence on a straight line drawn due west from the confluence of the said English River with the said Winnipeg River until the same will intersect the meridian above described, and thence due south, following the said meridional line to the said international monument; thence southerly and easterly, following upon the international boundary line between the British possessions and the United States of America, into Lake Superior.

"Given under our hands at Ottawa, in the province of Ontario, this 3d day of August 1878.

"ROBT. A. HARRISON.

"EDWARD THORNTON.

"F. KINCKS.

"Signed in presence of:

"THOMAS HODGINS.

"E. MONK."<sup>1</sup>

Great Britain and Peru.—Award of the commission appointed by the Senate of Hamburg to adjudicate the case of Captain T. Melville White, referred to that body for arbitration.

[House of Commons Paper No. 482 (1864); translation from the German.]

"The demand of the British Government for an indemnification of 4,500*l.* in favor of Thomas Melville White from the Republic of Peru, now under consideration, is based on the following points:

"1. The arrest and the long, unjust imprisonment of White, founded on a serious but wholly groundless and unsupported accusation.

"2. The suffering and annoyances to which he was subjected during his imprisonment.

"3. The neglect of the rules and principles not only of Peruvian but of universal law, which was evinced by delaying the trial, and by the manner in which the preliminary proceedings were conducted.

"4. His expulsion from the Peruvian dominions, as the result of these unjust proceedings.

"As Captain Thomas Melville White has also communicated a statement drawn up by him as claimant, it is to be observed, in reference to that document, that it can only be taken into consideration as being specially referred to in the representations of the British Government.

"It appears to be in general a passionate and partial account, with obvious misrepresentations and exaggerations, and wherein candor is wanting; for this reason the British Government could not get a clear idea of its contents. The arbitrator has, therefore, only to keep to the official representations of the Government.

"The four above-mentioned complaints will now be examined separately:

"1. With regard to the first complaint—the unjustifiable arrest and long imprisonment—it is first of all to be shown that White was arrested on

<sup>1</sup> Br. & For. State Papers, LXIX. 299-300.

the 23d March 1861, and, as his own account of the matter has not been contradicted (White's letter, folio 140 of the investigation documents), he was released on the 9th January 1862. The arrest took place in consequence of a communication made by Romero to the harbour captain of Arica, that he had reliable information that White was the delinquent who had attempted to murder the President of the Republic of Peru, Don Ramon Castilla. Now, there can be no doubt that it became the imperative duty of all the authorities, in consequence of the universally known fact that the President Castilla had been wounded, on the evening of the 24th of July 1860, by a pistol shot, fired by an unknown hand, and that the investigations to discover the author of this attempt had hitherto led to no definite result, to use all means in their power to prosecute inquiries with respect to such a suspected person, after the information given by an official of the republic.

"The crime in question was one of the most serious nature, and the arrest of the suspected person was the less to be avoided, as he was caught travelling and was well known to be without any fixed residence. It therefore remains to be ascertained whether the arrest of White was accomplished according to the precepts of the Peruvian laws applicable to the case.

"Now, Art. 18, Tit. IV., of the '*Constitution Política de Peru Reformada en 1860*' enacts that no person shall be arrested without a written order of the competent judge, or of the authorities whose duty it is to maintain public order '*excepto in flagrante delicto*,' and that in every case the arrested person shall be placed at the disposal of the proper tribunal within 24 hours. In the present case White was arrested at Callao on the 23d of March 1861, and on the same day, on the application of the prefect, Freyre, there came the order from the minister, Morales, that he should be kept in custody, sent to Lima, and there placed at the disposal of the criminal judge. (Folio 2 of the investigation documents.)

"By this the above legal requirement was the more undoubtedly satisfied, as at least a preliminary detention of the person caught on his journey must appear to be demanded at once, and if the prefect, Freyre, who apparently had the power of issuing the written order for the arrest, did not do so himself, but left the decision to the highest authority, it can only be looked upon as a proof of his caution and care in the performance of his duty.

"The second part of the first point of complaint advanced on the part of the British Government contains the assertion that the imprisonment of White had taken place in an unjust manner, on a serious but unfounded and in no way supported accusation. As a further proof of this assertion, it is said, at page 4 of the statement drawn up in the name of the British Government, that White was, according to the judgment in first instance, accused of being the instigator only of the crime of murder, and that no other accusation whatever was brought against him. This single accusation was, however, in the course of the proceedings, not only proved to be quite groundless, but that there was no evidence at all, nor a single fact, to give any apparent ground for it. But herein the British Government, irrespective of the correctness of the facts contained in its statement of the matter, proceeds on the erroneous supposition that the rules of criminal procedure in England are to be held good and applied in the criminal

proceedings in Peru; but, little doubt as there can be that the rules of procedure to be observed by the courts in any country are to be judged solely and alone according to the legislation in force there, it is quite as certain that in the proceedings in White's case no fault can be found with the Peruvian courts of justice, or with the Peruvian Government, since they were fully justified according to the Peruvian procedure.

"The difference between the English and the Peruvian mode of proceeding, which latter obtains also in other countries, consists in the diversity of the principle observed in the accusation and investigation. In Peru, when there are grounds for suspecting any person, an investigation takes place, during which all means are employed which may lead to the establishment of any crime whatever, without such investigation being limited to the particular crime of which the accused was originally suspected. It is only after the completion of the investigation, which embraces everything that can be elicited during the proceedings, that the attorney-general can proceed to the framing of the formal act of accusation, in which all the facts brought to light in the investigation are to be considered. Then only is the accused put upon his trial and counsel appointed to defend him; up to this point he has only been the subject of inquisition; the whole of the proceedings before the time of accusation are withheld from the public. It is obvious therefore that the principles of proceeding on simple accusation observed in England can not in any way find application in Peru, and therefore it is not consistent with justice on the part of the British Government to reject as inadmissible the statements of the attorney-general relating to the first accusation of Romero against White. This view is founded on the erroneous supposition that Romero is the accusing party and therefore bound by his statements.

"It is further, also, to be pointed out, that the assertion that Romero only accuses White of being the instigator of the attempt to murder is in no wise in accordance with the documents; for it was not the first preliminary information given to a subordinate authority, the harbour captain at Arica (the only object of which was the arrest of White), but his depositions on oath before the judge, that would then have to be considered as the complaint. But herein, also, is found the accusation that White was associated with open enemies of the country and implicated in a plot against the Government of Peru, and it was distinctly stated that he was an obstinate conspirator (folio 21 of the Accusation Documents). Although the sworn statements of Romero and Douglas, which fully agreed with each other, were, in regard to White having himself attempted to murder the president, Castilla, certainly only suppositions, yet such positive facts were elicited as proved beyond doubt the hostile feeling of White towards the government, and led to the fear that he might commit acts which would endanger the peace of the country. It was thus the strict duty of the judge to continue the investigation, with all care and exactitude, as long as other disclosures might be expected therefrom; and so all persons who might be supposed to have relations with the person under inquisition, or to be acquainted with him and his doings, were examined, except that unfriendly relations with the Republic of Bolivia rendered the examination of persons residing there impossible.

"It may here be observed that probably the testimony of Caro, who for this reason could not be examined, and to whom Douglas referred several

times in his depositions, would have been of particular value. It was therefore impossible to avoid waiting, at least a reasonable time, for an answer to the request to the authorities of Bolivia, dated 12th July, concerning the examination of Caro.

"A glance at the depositions of the accused himself, and of the witnesses examined, will suffice to prove that the charge of Romero was by no means unsupported.

"The accused deposes that he is on friendly terms with General Echenique, and admits that he is without occupation, as he believes he will be able to obtain it at Guayaquil by the interest of his friend. He admits that he is totally without means, as he received pecuniary assistance from the British chargé d'affaires, which is confirmed by the latter himself. (Folio 113 of the investigation documents.)

"The witness, Douglas, deposes to having heard the accused speak ill of the president, Castilla, and wish for his fall; further, that the accused had been present at an assembly at Corocoro, in which a toast had been drunk to the fall of Castilla and the elevation of Echenique, and that it had been stated it would be sufficient for this end to get Castilla out of the way. Caro, a friend of the accused, had told him (the witness) 'This man (White) will create a great sensation in Lima.' Deponent has seen bills of exchange from Echenique in the hands of the accused, and knows that he has much intercourse with him.

"Andrew Wilson deposes that the accused was thought to be a spy. Romero knows that he frequently traveled to visit Echenique, and that he was in connection with him and Linarez, whilst it could never be understood whence he derived the money for his journeys, as he was without occupation.

"Calista Peralta suspects him of being connected with a political association hostile to the government, from his mysterious manners and the frequency with which he tries to alter his appearance. Brain, Isabel, Dorra, Dauling, Worm, Williams, and others testify unanimously that the accused makes frequent journeys to the Republic of Bolivia and to Lima, without having any known business, and that he is in debt.

"At the conclusion of the investigation, the accusation of the attorney-general now declares that White is proved to be an individual without means or occupation, in debt, and without any fixed residence, and at the same time a friend of notorious enemies of the country; that he was strongly suspected of having attempted the murder of President Castilla, and of participating in plots against the government; but, as such proofs as the law requires for the purpose of conviction were wanting, the attorney-general proposes that the accused be released from the instance, but that he be banished from the republic as a foreigner without occupation and means and of proved bad conduct.

"The sentence of the first instance is fully in accordance with this proposition; the sentence passed in second instance by the *corte superior*, on the appeal in the name of the accused, annulled the previous sentence, and declared the accused quite free; finally, the sentence in the third instance of the *corte suprema*—which, strange to say, has not been mentioned at all in the statement of the British Government—declares the sentence in second instance null and void, and certifies further that White has not only been accused of an attempt to murder, but also of participating in

enterprises against the peace of the republic, and frees him in this latter respect only from the instance, with the order that he be placed under the surveillance of the police.

"Therefore, not only is the above-mentioned assertion, that the exclusive accusation against White was an attempt to murder, based upon error, but it is evident that the further assertion, namely, that it was proved in the course of the proceedings that this sole accusation was quite groundless, is in manifest contradiction to the documents, which can only be explained by the essential void in the statement of the British Government, occasioned by the omission of the sentence in third instance. But it is precisely on this final sentence that a proper understanding of the case depends, whilst all the conclusions drawn by the British Government being based on the judgment in the second instance are valueless, as this sentence itself has been declared void. Moreover, the sentence in third instance, in so far as it frees White only from the instance, is the more justified, as, besides that the accused had by no means fully cleared himself from the grounds of suspicion, the examination of all the witnesses could not take place on account of the external obstacles which interposed, and it might well be expected that a future examination of the witnesses Caro, Jerr, Maldonado, Pearson, and Ruperto would throw further light on the suspicions against the accused that were not cleared up.

"Therefore the first point of complaint is to be pronounced of no force; and now there is to be investigated how far, second, the sufferings and injuries to which the accused was subjected during his imprisonment give just occasion for complaint.

"Here it is to be observed, first of all, that in general, when the question concerns complaints made by a person kept long in prison of such injuries as he has endured during his imprisonment, his own assertions are always to be examined with the greatest caution, and unconditional credence is the less to be given to them, as such complaints very frequently arise in cases where the imprisonment was well deserved and in no wise too severe. Now, it appears incontrovertibly from the documents that White, being at the time of the arrest a foreigner, without occupation, income, or any fixed domicile, was by no means a personage who could lay claim to particular credibility for his statements, and especially not when the matter in question was a claim from which he, according to his own view, was to receive a good round sum of money. Numerous contradictions and demonstrable falsehoods which he put forward will be noticed hereafter in their proper places. To prove that the British Government, so far as it has sifted the matter, has always given by far too much weight to the assertions of White, it may suffice here to refer to that part of his statement (*vide* p. 22 ff.) which is described as an extract from the investigation and process documents. It contains in almost every line the most evident and grossest misrepresentations of the truth, as, on the one side, everything implicating White is throughout passed over in the extract, whilst what is quoted is often either entirely falsified or at least so disconnected that the result appears quite contradictory to the documents. For example, may be quoted that, according to the statement of White, the sentence, in first instance, reads, in its decisive part, word for word as follows:

"Upon which grounds I ought to acquit, and do acquit, Thomas Melville

White, as regards complicity in the crime of which he is accused, and generally from cooperating to upset public order; but he must be expelled,' &c.

"Whereas in the attested English translation, from the documents which he had before him, the sentence corresponding with the Spanish original is as follows:

"'Upon which grounds I ought to acquit, and do acquit, *from this instance*, Thomas Melville White, as regards,' &c.

"It is further said, page 30: Page 139 (of the English translation) contains the sentence passed by the supreme court in claimant's case, the substance of which is as follows:

"'*We confirm* the sentence of the superior court, acquitting Melville White of the horrible charge of which he has been accused. He must remain under the vigilance of the police.'

"But it is stated, word for word, on page 139 of that attested English translation:

"'*They declared null* the sentence pronounced by the most illustrious superior court, in as far as regards that, in absolute manner, it absolves Thomas Melville White, and reforming it, absolved him from the instance (*instantia*) as to the rest of the charges that have weighed against him, and have been cited, and he ought to remain subject to the vigilance of the police.'

"And in the face of such wilful misrepresentations of the truth, Thomas Melville White maintains by declaration, in place of oath, before Major Rosi, on the 25th of September 1863, 'that all the statements contained in the subjoined case, written and drawn up by me, are strictly in conformity with truth.'

"No weight whatever ought, therefore, to be attached to the assertions of a man so wanting in veracity.

"On entering upon the second point of complaint it is, in the first place, scarcely necessary to remark that the arrest of White, as carried out, was fully justified, and was effected without any resort to force, for the harbor captain, Benjamin Mariategni, reports that White submitted without resistance to the order for his arrest, and there is nothing that could support a contrary supposition.

"The above-mentioned complaint may be thus specified in detail: That White was kept in custody for a long time *incommunicado*; that he had been kept up to the 27th of August confined in a dirty, loathsome cell, without sufficient food, and, lastly, that he had been subjected to torture and ill treatment. Now, with regard to the first point, it has not been asserted at all that, according to Peruvian law, the examining judge has no power to order the imprisonment of a person under examination debarring communication. It would be unjust to deny the judge such power on the general principles of law; it ought rather to be taken for granted that, when a person has been arrested on suspicion of a serious crime, the judge can often only secure the necessary disclosures by preventing all communication with the prisoner, and thus avoid the danger of collusion, by which the investigation might be prejudiced. Besides, according to the report of Judge Ponce, White was only in custody *incommunicado* for two days (namely, on the 26th and 27th of March); and Judge Ponce, to prove that the isolation was by no means strict, justly states that even during this



time the prisoner found means to elude the order, as, according to his own statement, he received a newspaper from a fellow-prisoner, and found means to have his written complaint printed in the journal *Comercio* of the 28th of March.

"It is, moreover, fully proved by the depositions of Bauda, Carillo, Milan, and Harzu, who were examined upon oath at the beginning of April (folio 9 *et seq.* of the investigation documents), that White, at the beginning of the imprisonment, was not *incomunicado*, but received frequent visits from his countrymen, and had, moreover, the opportunity of repeating his complaints and threats before fellow-prisoners.

"By the same witnesses it has been proved—and this also has been acknowledged by the British Government (*vide* page 16 of its statement), but denied by White (*vide* page 22 of his statement)—that the sum allowed to political prisoners to secure comforts during their imprisonment (namely, one dollar per day) had been repeatedly offered to White, but was refused by him in an insolent manner. His statement, therefore, that he had for days together received no other food than damaged rice is the less credible, as Judge Ponce declares, in his report of the 20th of April 1861, that the food given to prisoners is, according to the legal regulations, tested by the judges every day, and that strict care is taken that it be good and wholesome. With regard to the locality in which the prisoner was, Judge Ponce declares that, so long as the isolation of the prisoner lasted, a place was assigned to him in the courtyard of the prison which had formerly been the residence of the keeper (*castellan*), and was airy and by far better than the locality assigned to political prisoners. Ponce further reports, on the 23rd of October 1861, that during the whole of his imprisonment, up to that time, an abode had been assigned to him which freed him from contact with other prisoners, without preventing him from receiving the visits of his friends; in fact, he received frequent visits, amongst others from Colonel O'Gorman. The credibility of these official reports of Ponce does not appear to be at all shaken, for there is nothing whatever against them except the assertions of White, which have been partly refuted by the fullest proof, and which do not appear to be sustained by the slightest probability. The British Government has mentioned nothing that would do so, nor has it referred to the documents contained in his statement, which therefore do not require consideration. But it may be openly stated that the pretended declarations of Henry Cornell, produced in an unattested copy, can not be attended to at all, since there is no warrant whatever for their genuineness; further, that the voluntary depositions of O'Gorman, on the 28th of September 1863, can not be allowed to have any force as proof, considering that at that time two years and a half had elapsed since White's arrest, that nothing was positively known either of the deponent himself or of his relations with White; but these depositions themselves are only calculated to lead to the conjecture that he was too intimately connected with the interests of White to be willing to give altogether the unbiassed truth. Now and then he is guilty of notoriously false statements; for instance, when he asserts (page 39 of White's statement):

"That from the first moment of his incarceration, it was notorious in Lima (where the real perpetrator of the crime was known), that Captain Thomas Melville White was entirely innocent; and the government, in a

few weeks after his arrest, had positive information from their own official authorities that he was at the time of the attack made in Lima on General Castilla, a thousand miles from that city.'

"It can only be thought natural that the British Government has not even once appealed to such testimony as this.

"An evident refutation of White's statements in regard to the condition of his prison must be found in this: That Mr. Barton personally visited the prisoner on the 23d of August 1861, as representative of Mr. Jerningham, and on the following day wrote the letter before us in reference thereto to the Minister Melgar. He says not a word about having found the prison unfit, but merely requests to be informed whether it was likely that the investigation would soon terminate, as the prisoner complained that he was suffering from an affection of the liver in consequence of his long detention. When, therefore, on the following day a better prison was assigned to White (page 24 of the report of the British Government), it only shows how anxious the government and authorities of Peru were to anticipate the wishes on behalf of the prisoner.

"The description of White's sufferings which precedes the above-mentioned letter of Mr. Barton, who is supposed to have witnessed them, is in evident contradiction with the contents of this document, and appears to be based only on the false statements of White.

"The occasion of that visit of Mr. Barton was the complaint made by White of the tortures that he had suffered in the 'barra,' in which he had been shut up for a long time. But it is proved by the documents (*see* fol. 106 of the investigation documents) that White, on his examination on the 20th of August, demanded the reading of various documents, which, as is admitted at page 23 of the statement of the British Government, were drawn up in an unbecoming tone, and contained abuse of the government and of judicial persons.

"But it is again a misrepresentation when it is said that the judge on this occasion was not satisfied with refusing to receive these documents, but ordered White to be put in irons; for he received this punishment for having answered Judge Ponce by personal threats, when cautioned with regard to these documents (*see* fol. 107 and 108 of the investigation documents.)

"Such contempt of the dignity of the judge demanded punishment, and that inflicted on White does not appear to have been too severe, as, according to the official statement of Ponce, dated 7th of September, he was not shut up in the 'barra' for more than 10 minutes.

"After all this, there is not the slightest proof that White was treated during his arrest with undue severity; and his unsupported assertions with reference to his treatment have not even probability in their favor, considering his proved untrustworthiness, and in the face of the official reports of the judge and other authorities.

"3. The third complaint of the British Government is, that in the present case the rules and principles of the Peruvian law and the universal sense of justice have been neglected, as is demonstrated by the delay of the trial and by the course and mode of proceedings which preceded it.

"In the first place, with regard to the delay of the trial itself, it has already been stated that the mode of criminal procedure in Peru is a combination of proceedings on investigation and accusation, and that in

conformity therewith the accusation can only be proceeded with after the preliminary investigation is fully completed.

"Now, by a decree of the attorney-general of the 8th of August, the penal proceedings were commenced, and the accused was informed of this decree on the same day. On the 11th it was ordered that Judge Carillo should take cognizance in first instance, after the penal accusation had been made, and he gave up the further instruction of the matter on the 14th to Juarez. On the 13th the attorney-general ordered the appointment of an interpreter, on the representation of the accused that he had to make some declarations in his cause. This interpreter was appointed on the 19th. On the 20th the final examination of the accused took place, and on the 23d of August came the public accusation on the part of the attorney-general. On the 26th of September the advocate, Pablo Mora, delivered his written defense; on the 30th Juarez ordered the examination on oath of the president, Castilla, for the completion of the documents. This examination took place on the 18th of October. On the 8th of November Juarez ordered the production of an authenticated copy of the '*decreto de interdiccion*,' which was obtained on the 10th, and on the 30th of November the sentence in first instance was delivered. It is evident from this account that no delay had taken place from the delivery of the accusation to the 10th of November; and if the judge in first instance was reprimanded by the sentence of the corte superior for not having delivered his sentence sooner, this reprimand can only refer to a delay between the 10th and 30th of November, as he had not acted as judge at all in the investigation.

"As the sentence in second instance was given on the 14th of December and that of the corte suprema on the 23rd of that month, it certainly appears that sentences in criminal cases are delivered in Peru with especial promptitude. But as the period of 20 days between the completion of the documents and the finding, in first instance, cannot be considered a delay of importance, compensation on this ground in favour of the accused can be the less demanded, as, according to the Peruvian law, a fine (*Ordnungsstrafe*) only can be imposed in case of delay in official judicial proceedings. It is, moreover, to be questioned whether the reprimand of the judge by the corte superior ever came into operation, as the corte suprema has declared the sentence of that tribunal to be null.

"It remains, therefore, to investigate how far the above-named third complaint of the British Government appears to be founded on the course of the proceeding during the preliminary examination.

"This complaint may be divided, according to the contents of the statement before us, into the following points: (1) That a written order, by virtue of which White was arrested, was never shown or delivered to him; (2) that no document containing an accusation was produced during the investigation; (3) that an interpreter was denied to White, notwithstanding his request; (4) that no counsel was allowed him up to the conclusion of the investigation; (5) that force and intimidation were resorted to in the examinations during the investigation, and that the examinations were altogether of a very inquisitorial character; (6) that White was not confronted with any of the witnesses on whose evidence the accusation of the attorney-general was based; (7) that the investigation and, consequently, the opening of the trial had been delayed.

"As regards the first point, it has already been stated that the written

order of arrest above mentioned was issued by the Minister Morales as prescribed by the law. The art. 18 of tit. 4 of the *Constitucion Política del Perú* ordains 'Los ejecutores de dicho mandamiento estan obligados á dar copia de el siempre que se les pidiere' (those who execute this order are bound to give a copy of it whenever they are asked.)

"Now, it does not appear from the investigation documents that White himself ever asked for the communication of such a copy, whilst, according to the above legal provision, it was in that case only that it was usual to give the same, but there can be the less doubt that a copy would have been delivered to him on his asking for it, as from the documents it is evident that the whole of the important judicial decrees had been handed over to him whenever the rules of procedure permitted. A reference to the correspondence between Mr. Jerningham and the minister, Melgar, shows that the former requested to be informed on the 17th of April, whether the arrest of White had been legally made on the written order of a competent authority. To this question a perfectly satisfactory answer may be found in the reports of Miguel Baguero and Manuel Freyre of the 1st of May, communicated to Mr. Jerningham. It is, however, certain that from the 20th of August, at any rate, White was aware of the wording of the order of arrest, although he had not asked any official for a production of the copy, as on that day the whole of the documents were read over to him (folio 104 of the investigation documents).

"Lastly, an irregularity on the part of the authorities against the prescription of Tit. IV., art. 18, could only entail a fine, as the documents prove that the order of arrest had been made according to law, and that, consequently, no material right of the prisoner had been violated.

"The fact of no document containing the accusation having been put before the accused requires no justification. In the preliminary investigation the communication of the accusations and grounds of suspicion takes place regularly and properly only when the investigating judge who has to prepare the accusation considers it necessary.

"No less untenable is the complaint that no counsel was allowed the accused during the investigation. That appears to be utterly inadmissible in preliminary investigations. At the opening of the judicial trial counsel was granted to White as the Peruvian law requires, and he conducted the defense with the utmost zeal. It is evident that the granting of counsel in preliminary investigations preceding a criminal trial can not be claimed by art. 7 of the treaty of 10th April 1850, which stipulates that in no case shall counsel be denied to British subjects any more than to natives, as at this stage counsel is not allowed to natives. (See Report of Judge Ponce, dated 7th September 1851.)

"The complaint also that an interpreter was denied to the accused is proved to be unfounded. The report of Banda (folio 7 of the investigation documents) proves that the accused was asked before the examination, whether he was acquainted with the Spanish language and that he replied in the affirmative. White's knowledge of the language may also be inferred from his signing, without protest, the minutes of the examination (folio 6, *ibid.*), and it is also proved by the testimony of Calista Peralta (folio 48, *ibid.*). The order therefore of the attorney-general, which denied this request as frivolous, is fully justified.

"The assertion of White that threats and intimidations were used, and that he had even been forced to sign a false document, appears to be a pure invention in the face of the documents and the official reports of Ponce (*vide* folios 4 and 102 of the investigation documents) and the reports of Ponce of the 29th of April and 7th of December 1861.

"That White was forced to sign any document is the more evidently untrue, as not only was there no reason whatever for it, but also because he refused to sign nearly all the documents laid before him; nor was he ever asked to do so a second time; for it was quite immaterial to the course of the proceedings whether his signature was given or not.

"Finally, just as little can there be any just complaint that the accused was not confronted with any of the witnesses examined, the order for such confrontation depending solely on the discretion of the investigating judge, and on his conscientious consideration whether it would be desirable for the purpose of ascertaining the true state of the case.

"In the present case the judge could not deem it desirable, as there were no contradictions to be cleared up, for which purpose such confrontations are usually ordered; for White says nothing at all against the evidence of the witnesses, but contented himself by declaring that such testimony did not affect him and accusing the Peruvian Government of having bought it.

"But, as it is stated on page 17 of the statement of the British Government, 'It appears that the judges, when they ascertained from his answers to their own interrogatories that he desired any particular witnesses to be examined on his own behalf, took similar means for procuring the testimony of these witnesses.' It is only thereby acknowledged that the judge did his duty according to the legally inquisitorial character of the preliminary investigation for a penal accusation.

"It must be repeated that the principles of law which obtain in England are not applicable here.

"Now, as White was arrested on the 23rd of March 1861, and the accusation of the attorney-general was not made until the 28th of August, it appears at first sight that the investigation lasted an unusually long time. But it was necessary, first of all, to examine a great number of witnesses, and at four places, far distant from each other, namely, Lima, Arica, Tacna, and Iquique, and it appears from the documents that the time up to the 4th of July was fully occupied by that examination and by the necessary official communications of the various courts with each other, as well as those of the acting judges with the higher authorities, for the purpose of obtaining their decisions; and there does not appear to be any ground for charging the courts and authorities with dilatoriness. On the 4th of July it was reported from Arica that the examination of the witnesses Pedro, Caro, Jerr, Thomas Pearson, and Manuel Ruperto could not be obtained, as they resided in the Republic of Bolivia. Then, as it could not well be left undone in the then state of the investigation, the necessary steps were taken to obtain their evidence there; but as no answer had, up to the 8th of August, been given by the ministry of the Republic of Bolivia to the written request made for that purpose, the attorney-general, in order to avoid a useless delay, decided on the following day that the proceedings should commence forthwith. That from this day no delay took place

up to the sentence in the third instance, with the exception already mentioned as not satisfactorily explained, but at all events of no importance, has been shown above.

"This complaint also must therefore be considered as disposed of.

"4. The last complaint of the British Government, 'The expulsion of White from the territory of Peru as the result and consequence of such unjust proceedings.'

"As the basis of this complaint, the statement of the British Government says (at page 29) that, although the corte superior had annulled the sentence in the first instance, that White should quit the country, the Peruvian Government ordered him to leave the country, and that this order had been transmitted to him through the prefect of the town of Lima, to whom he was ordered to present himself on his release on the 9th of January 1862.

"These alleged facts are, however, contradicted by the documents. In the first place, the sentence of the corte superior is of no importance, as that sentence was quashed by the corte suprema, and only orders a surveillance by the police of the accused, who was freed from the instance. There is no mention, therefore, of banishment in the sentence. Moreover, there is no foundation whatever for the assertion that the Peruvian Government gave this order of banishment contrary to the final judgment. The circumstance also that this complaint was never pressed at the previous diplomatic proceedings by the British Government against the Peruvian Government does not add to its credibility; but the untruth of this assertion is evident from the letter which White addressed to the criminal judge on the 15th of January, in which he requests (fol. 1 of the investigation documents) to be furnished forthwith with copies of the documents of the trial, 'as he was obliged to quit the republic on account of urgent private affairs.'

"As it appears, therefore, from all that precedes, that the British subject, Captain Thomas Melville White, was arrested on Peruvian territory on occasion of serious suspicions, based upon important information; that the investigation has been conducted with zeal and circumspection, in conformity with the regulations of the Peruvian laws, and without procrastination; that he was publicly accused in consequence of the result of this investigation and by no means found innocent, and was therefore not absolved by the legally valid sentence of the supreme court of Lima, whose jurisdiction is not at all questioned, from the charge of hostile agitation against the republic, but only freed from the instance; while the assertions that White had been treated during his arrest with cruelty and severity, and expelled from the country by the Peruvian Government, contrary to the sentence, when not in direct contradiction to the documents, are wholly destitute of any credible foundation—the present claim on the part of the British Government for a pecuniary compensation for White appears of no force whatever, and is to be rejected as unfounded.

"The costs to which each party has been put with regard to these proceedings are to be borne by themselves. The costs incurred by the commission in these proceedings are to be paid, a moiety by each party.

"In fidei,

"W. CROPP, *Secretary.*

"HAMBURG, 13 April 1864."

**Great Britain and Portugal.**—Award of the Senate of Hamburg on the complaint of Mr. Croft against the Portuguese Government February 7, 1856.

[Translation.]

“The complaint against the Portuguese Government, which has been referred by Mr. Croft and supported by the British Government, is to the effect that the Portuguese administrative authorities, by denying to Mr. Croft the patent of registration, have infringed those rights which had been adjudged to him by judicial decisions, and thus, in contravention of the constitutional Charter of the kingdom, have withheld the acknowledgment due to the acts of the judicial power; wherefore the Portuguese Government is liable for damages.

“This claim rests, therefore, on the twofold allegation: (1) That the administrative authorities have acted illegally; and (2) that the government is responsible for the consequences of the illegal proceedings.

“Neither of these allegations can be admitted.

“The administrative authorities, in refusing to grant the patent, acted in conformity with the administrative code which regulates their powers, and with the special laws respecting the registration of donations; for, according to section 254 and section 280 of the said code, they are invested with the function of pronouncing on the admissibility of registrations; and the registration, in the present case, even without referring to the law of the 25th January 1775, which perhaps may not be applicable herein, was at all events inadmissible, according to the prescriptions of Ordinance 1, IV. t. 62, on account of the donor's decease having already taken place. Though differences of opinion might possibly prevail with respect to the latter point, and though, in the case of the Viscount das Picoas, a decision was actually pronounced in a different sense, yet, notwithstanding this, on a closer examination of the case, even those lawyers who had formerly expressed such an opinion (viz, the Attorney-General Ottolini and his assistant, Rangel de Quadros) have retracted it, as may be seen by the unanimous declaration at the conference of 16th October 1850, and a single previous judgment, or precedent, which has been wrongly pronounced before, can not establish a rule for all cases to come, especially where a contradiction of distinct written laws is involved. The committee is of opinion that the grant of registration was justly refused by the administrative authorities. It would be of this opinion, even though, in the suit of Mr. Croft against the family of Barcellinhos, the judicial decisions had prescribed that registration to the administrative authorities, for, with the separation existing between the ordinary tribunals and the tribunals of administrative justice, according to the constitution of the Portuguese monarchy, the former are in no wise competent to prescribe to the latter the way in which they are to decide. On the contrary, the latter have only to proceed according to the legal regulations provided for them. When a court of justice has imposed on a party in a civil suit the duty of performing a certain act before the administrative authorities which, at the time when it is attempted, can, in pursuance of the regulations of the administrative authorities, no longer be done, then the act thus imposed has become an impossibility; but no blame can therefore be imputed to the administrative authorities. The fact is, however, that the legally valid judicial decisions never, in any way, imposed such a duty. The

authoritative decision of the court of appeal at Oporto, dated March 31, 1843, does not say at all that the registration of the donation is to take place either during the lifetime or after the decease of the Baron de Barcelinhos; but it merely says that were it not to take place, the marriage portion on the Baron's death would appear valid only so far as it did not exceed the legitimate share and the legal tax, and that any surplus would have to be recognized and returned as invalid. This meaning of the Oporto judgment is not only apparent from the wording thereof and from the opinions of the judges who pronounced it, but it is likewise unequivocally acknowledged by all the later judicial decisions (the decrees of the Lisbon court of appeal, dated March 12, 1844; of the Judge Novaes, dated July 15, 1850; of the Lisbon court of appeal, dated October 4, 1851, and the opinions upon which these decrees were formed), so that the assertion that the Oporto judgment pronounced a compulsory duty of registration at any time whatever, or even at a specified time—that is, after the death of the Baron—is not founded on fact. But that judgment, as well as all the subsequent judicial decisions, on the contrary, very properly left the question concerning the admissibility and the period of the registration solely to the application to be made to the administrative authorities, and the judgment there to be pronounced, confining itself to the declaration that if a registration were proved, the dowry would be legally valid to its whole amount, whereas, in the contrary case, the part exceeding the legitimate share, and the tax of the law, would be regarded as liable to be rescinded.

"The first of the two propositions must therefore be negatived, and this is no less the case in regard to the second proposition.

"For, even admitting that the administrative authorities who refused the patent were entirely wrong in doing so, nevertheless it could not be inferred that the Portuguese state was bound to make good any possible damage thereby occasioned to Mr. Croft. The acting administrative authorities, the municipal administrator (*administrador do conselho*) in first resort, the district council (*conselho de districto*) in second resort, and the council of state, on whose opinion the royal decree of the 4th December 1849 was issued in third resort, had to give a decision in a litigated case, and in this branch of their functions they act, not in the character of mere executors of the government's orders, but as actual authorities pronouncing the sentence of the law, such authorities existing according to the Portuguese constitution, likewise in the province of the administration. For when a certain class of legal questions, according to the provisions of this and of many other similar state constitutions, has been taken away from the ordinary courts of justice and assigned to a special jurisdiction instituted for such questions occurring in the administration, the exercise of this jurisdiction not the less involves an actual judicial activity, since its practice depends solely on the free and independent righteous convictions of the individuals legally entrusted with it, and not on obedience to superior orders; and from this it follows at once that it is impossible that the higher authorities of the government or of the state should be responsible for sentences pronounced by that jurisdiction. There can be no question here of the exceptional cases which, in the opinion of Vattel (II. 7, sec. 84), may justify the reclama-



tion of a foreign government even against judicial sentences affecting one of its subjects, since none of the suppositions enumerated by Vattel agrees with the perfectly just decisions given in the present case. Therefore the second allegation on which the English Government would base the claims of Mr. Croft must also be declared unfounded.

"It is true that the Portuguese Government itself, after having a long time steadfastly maintained the justice of the proceedings of the administrative tribunals in refusing the patent, notwithstanding, towards the end of the year 1851, in order to meet the wishes of the English Government, and in consequence of its urgent representations, tried to bring about a contrary arrangement, Her Majesty's ministers instituting a motion for redress by means of a statement addressed on the 17th November 1851, according to XCIV. of the regulations of the council of state, to the president of the department of legal questions, in order that the council of state might reconsider the matter and cancel its former resolution, which confirmed the decision of the district council, upon which the decree of 4th December 1849 was passed; and in this statement the ministers made use of all those arguments which the English Government had up to that time brought to bear against the proceedings of the administrative authorities, and which the committee, as has been explained above, can not consider as well grounded. But when, after this, the council of state, in united sections, delivered its opinion on this motion of the government on grounds which appear to the committee correct on all points, to the effect that the motion appeared neither formally or materially admissible, then the government went even further, and on the 3d of January 1852 issued a decree which, in the form observed in deciding on motions in litigated cases, expressly setting aside, however, the contrary opinion of the council of state, annulled the decree of the 4th of December 1849, and now decided on the appeal from the sentence of the district council of the 10th May 1849 that the patent was to be granted, which, then, was granted accordingly.

"From these proceedings of the Portuguese Government, in November 1851 and January 1852, the English Government would infer that the Portuguese Government itself acknowledged the illegality of the former administrative decisions and admitted the obligation to hold Mr. Croft harmless and to put him in the situation in which he would have found himself if, on the 18th of November 1848, when the municipal administrator gave his judgment against it, that functionary had granted him the patent.

"If what was contained in the statement of the 17th November 1851 had been expressed in a note or other diplomatic communication, addressed to the British Government by the Portuguese Government as its view of the case, it might then have been justly said that the one government had thereby of itself made an acknowledgment and an admission to the other by which the latter was now altogether exonerated from the task of proving that the case really stood as it was represented there. But no such character can be ascribed to the expressions of that statement, which, from its nature, was merely an address to the council of state, to move it, if possible, to alter its former decision as the Portuguese Government wished, on account of the friendly relations with England. Whatever was said

in such an address for the sake of supporting the request preferred, the party on whose behalf and in whose favour it was made can not thence deduce acknowledgments for itself. If, therefore, it is said in the statement that the decisions of the administrative authorities contained a 'déni de justice,' because they did not respect the legally valid judicial sentences, and involved 'presque une distinction odieuse,' to the prejudice of an Englishman; because, in the year 1838, in the case of the Viscount das Picoas, a different decision had been given; these are, in truth, but arguments made use of in order to procure a decision of the council of state in accordance with the desires of Mr. Croft, but in no wise admissions made to him or to the English Government, *animo confitendi*, or which might be made available as such. It is the same with all the rest of the representations in that statement, the purpose of which was evidently to bring before the council of state, as completely as possible and with urgent support, the arguments which the British Government had hitherto brought to bear in the matter which it defended. The council of state, however, in its resolution of the 10th of December 1851, justly, as it appears to the committee, rejected these arguments as unfounded.

"Nor does the decree of the 3rd January 1852, which the Portuguese Government next resolved to issue, afford grounds, any more than the statement of 17th November 1851, for deducing an acknowledgment on its part of an obligation to pay an indemnity; for, in the first place, neither is this decree an international communication between the two governments, but it is a judgment pronounced in a litigated matter; and, in the second place, even if any admission were to be deduced from that decree, it could only be this, that the administrative authorities had acted illegally before, and not this, that the Portuguese state was obliged to make good the damages arising from that action, which is something altogether different, and, according to what is said above, not at all self-evident, though that would be essentially requisite, in order to be able to assert that the Portuguese Government had recognized the claim now made upon it.

"Neither can any acceptance of a fresh liability on the part of the Portuguese Government toward the British Government be found in the decree of the 3rd of January 1852, for this could only be the case if either it contained a promise or it had occasioned a damage to Mr. Croft.

"If at any time the Portuguese Government, or its legal representative, had given to the British Government, in its usual forms of international intercourse, a promise that Mr. Croft should be assisted in obtaining the satisfaction of his claims, or that he was to be held harmless in regard thereto, then there could be no doubt that a perfectly valid title to satisfaction or indemnification from the Portuguese state would arise therefrom, since those are the constitutional forms recognized by the law of nations, in which the international obligations of one country toward another are contracted. But the same can not be asserted of a case where nothing else is apparent but an order which the government issued to its own authorities in favour of a foreign subject, without any promise having been previously made to that subject's government. If in such a case the order meets with constitutional obstacles, which render its execution impossible, no claim founded on international law can be made upon the

government for damages on account of its order not having been carried into execution. It is, therefore, conceivable that the order given in the decree of the 3rd of January 1852, namely, the issue of the patent therein directed, might not have been executed at all, in consequence of some legal obstacle, independent of the government's will; and yet that no claim on the Portuguese state for indemnification could have been founded thereon by the British Government or its subject. This, however, has not happened, but the order of the 3rd of January 1852 has been executed, and the patent has been granted to Mr. Croft. He has thus actually obtained what he desired, and the object of his desire has always been only to present the patent before the courts of justice and thereon to get from them a judgment against the family of Barcellinhos. He must now proceed in that way and wait for the result of the judicial decisions, wherein, however they may turn out, he is to recognize his only legal remedy. Least of all will he be able to assert that any damage whatever has accrued to him from the decree of the 3rd of January 1852. On the contrary, the most recent judicial decision lying before the committee in Mr. Croft's suit against the family of Barcellinhos, namely, the judgment of the supreme tribunal of justice of the 14th August 1854 opens to him the prospect that, in consequence of the patent having now been granted in obedience to the decree of the 3rd of January 1852, he might expect a favorable issue of his suit. However, be this as it may, and whatever be the purport of the final sentence to be pronounced in the cause against the family of Barcellinhos (since the above-mentioned judgment of the supreme tribunal of justice has not as yet the force of a definitive decision), at all events, it is not to the decree of the 3rd of January 1852 that Mr. Croft will have to ascribe any unfavorable issue of his lawsuit. If any one could prove damage from that decree, it could only be the family of Barcellinhos, in case, namely, of their being adjudged according to the aforesaid decision of the supreme tribunal of justice, to pay on account of the patent now produced the whole of the marriage portion. For in so far as the issue of that decree may involve any infringement of law and established rights, the Barcellinhos family would then be able to set up a claim for redress conformably with the Portuguese laws, and so far as they allow of it, whether against the Portuguese state treasury or against the originators of the decree. But the committee can by no means, on account of a contravention of law, possibly permitted by the Portuguese Government, to the prejudice of the Barcellinhos family, adjudge to Mr. Croft, in whose favor that very contravention would have taken place, a claim of damages against the said Government.

"On these grounds the committee gave the required award as follows: That the Portuguese Government is to be discharged from the claims made on the part of the English Government in favor of Mr. or Mrs. Croft, as also from the claims which Mr. and Mrs. Croft have set up against the Portuguese Government; the costs which each of the two parties has incurred on account of this arbitration are to be borne by themselves; of the costs incurred by the committee, one moiety is to be paid by each party.

[L. s.]

"ASHER, DR."

(British and Foreign State Papers, L. 1288-1294.)

**Great Britain and Portugal.**—In 1861 an award was rendered by the Senate of Hamburg as arbitrator in respect of the claim of Messrs. Yuille and Shortridge, British subjects, against the Government of Portugal. The award has not been published by the British Government, and does not appear to have been published by the Portuguese.

**Great Britain and Portugal.**—Award of the President of the French Republic on the claims of Great Britain and Portugal to certain territories formerly belonging to the Kings of Tembe and Mapoota, on the eastern coast of Africa, including the islands of Inyack and Elephant. (Delagoa Bay or Lorenzo Marques.) Versailles, July 24, 1875.

Nous, Marie Edme Patrice Maurice de MacMahon, Duc de Magenta, Maréchal de France, Président de la République Française, statuant en vertu des pouvoirs qui ont été conférés au Président de la République Française aux termes du Protocole signé à Lisbonne, le 25 septembre 1872, par lequel le Gouvernement de Sa Majesté la Reine de la Grande Bretagne et d'Irlande et celui de Sa Majesté le Roi de Portugal sont convenus de déférer au Président de la République Française, pour être réglé par lui définitivement et sans appel, le litige qui est pendant entre eux depuis l'année 1823, au sujet de la possession des territoires de Tembe et de Maputo et des Iles d'Inyack et des Éléphants, situés sur la Baie de Delagoa ou Lorenzo Marquez, à la Côte orientale d'Afrique;

Vu les mémoires remis à l'Arbitre par les représentants des deux parties, le 15 septembre 1873, et les contre-mémoires également remis par eux, les 14 et 15 septembre 1874;

Vu les lettres de son excellence M. l'Ambassadeur d'Angleterre et de M. le Ministre de Portugal à Paris, en date du 8 février 1875;

La Commission instituée, le 10 mars 1873, à l'effet d'étudier les pièces et documents respectivement produits, nous ayant fait part du résultat de son examen;

Attendu que le litige, tel que l'objet en a été déterminé par les mémoires présentés à l'Arbitre et, en dernier lieu, par les lettres ci-dessus citées des représentants à Paris des deux parties, porte sur le droit aux territoires suivants, savoir:

1. Le territoire de Tembe, borné au nord par le Fleuve Espirito Santo ou English River, et par la Rivière Lorenzo Marquez ou Dundas, à l'ouest par les Monts Lebombo, au sud et à l'est par le Fleuve Maputo, et de l'embouchure de ce fleuve jusqu'à celle de l'Espirito Santo par le rivage de la Baie de Delagoa ou Lorenzo Marquez;

2. Le territoire de Maputo, dans lequel sont comprises la presqu'île et l'île d'Inyack, ainsi que l'île des Éléphants, et qui est borné au nord par le rivage de la baie, à l'ouest par le Fleuve Maputo, de son embouchure, jusqu'à un parallèle de 26° 30' de latitude australe, au sud par ce même parallèle, et à l'est par la mer:

Attendu que la Baie de Delagoa ou Lorenzo Marquez a été découverte au 16<sup>ème</sup> siècle par les navigateurs Portugais, et qu'au 17<sup>ème</sup> et 18<sup>ème</sup> le Portugal a occupé divers points sur la côte nord de cette baie et à l'île d'Inyack dont l'île des Éléphants est une dépendance;

Attendu que, depuis la découverte, le Portugal a, en tout temps, revendiqué des droits de souveraineté sur la totalité de la baie et des territoires riverains, ainsi que le droit exclusif d'y faire le commerce; que, de plus,

il a appuyé à main armée cette revendication contre les Hollandais vers 1732, et contre les Antrichiens en 1781;

Attendu que, les actes par lesquels le Portugal a appuyé ses prétentions n'ont soulevé aucune réclamation de la part du Gouvernement des Provinces Unies; qu'en 1782 ces prétentions ont été tacitement acceptées par l'Autriche, à la suite d'explications diplomatiques échangées entre cette Puissance et le Portugal;

Attendu qu'en 1817 l'Angleterre elle-même n'a pas contesté le droit du Portugal, lorsqu'elle a conclu avec le Gouvernement de Sa Majesté Très-Fidèle la convention du 28 juillet, pour la répression de la traite; qu'en effet, l'Article 2<sup>ème</sup> de cette convention doit être interprété en ce sens qu'il désigne comme faisant partie des possessions de la Couronne de Portugal la totalité de la baie, à laquelle s'applique indifféremment l'une ou l'autre des dénominations de Delagoa ou de Lorenzo Marquez;

Attendu qu'en 1822 le Gouvernement de Sa Majesté Britannique, lorsqu'il chargea le Capitaine Owen de la reconnaissance hydrographique de la Baie de Delagoa et des rivières qui y ont leur embouchure, l'avait recommandé aux bons offices du Gouvernement Portugais;

Attendu que si l'affaiblissement accidentel de l'autorité Portugaise dans ces parages a pu, en 1823, induire en erreur le Capitaine Owen et lui faire considérer de bonne foi comme réellement indépendants de la Couronne de Portugal les chefs indigènes des territoires aujourd'hui contestés, les actes par lui conclus avec ces chefs n'en étaient pas moins contraires aux droits du Portugal;

Attendu que, presque aussitôt après le départ des bâtiments Anglais, les chefs indigènes de Tembe et de Maputo ont de nouveau reconnu leur dépendance vis-à-vis des autorités Portugaises, attestant ainsi eux-mêmes qu'ils n'avaient pas eu la capacité de contracter;

Attendu que, les Conventions signées par le Capitaine Owen et les chefs indigènes du Tembe et du Maputo, alors même qu'elles auraient été passées entre parties aptes à contracter, seraient aujourd'hui sans effet, l'acte relatif au Tembe stipulant des conditions essentielles qui n'ont pas reçu d'exécution, et les actes concernant le Maputo, conclus pour des périodes de temps déterminées, n'ayant point été renouvelés après l'expiration de ces délais;

Par ces motifs nous avons jugé et décidé que les prétentions du Gouvernement de Sa Majesté Très-Fidèle sur les territoires de Tembe et de Maputo, sur la presque île d'Inyack, sur les îles d'Inyack et des Éléphants, sont dûment prouvées et établies.

Versailles, le 24 juillet 1875.

MAL. DE MACMAHON, *Duc de Magenta.*

#### Great Britain and Portugal—The Manica arbitration:

"We, Paul-Honoré Vigliani, late chief president of the court of cassation of Florence, minister of state and senator of the Kingdom of Italy, arbitrator between Great Britain and Portugal as regards questions relative to the delimitation of their spheres of influence in east Africa;

"Considering the declaration signed in London on the 7th January, 1895, by Lord Kimberley and M. Luiz de Soveral, which contains the reference to the arbitrator ('Acte de Compromis'), the tenor of which is as follows:

"On the 11th June 1891 a treaty was signed between Her Majesty the

Queen of the United Kingdom of Great Britain and Ireland, Empress of India, and his Most Faithful Majesty the King of Portugal and the Algarves, which treaty settled the question of the boundaries of their possessions and spheres of influence in eastern and central Africa.

"Article II. of this treaty contains the demarcation of the boundary to the south of the Zambezi; that is to say, from the point on the bank of this river opposite the mouth of the Aroangoa, or Loangwa, as far as the point where the boundary of Swaiziland intersects the river Maputo.

"Differences having arisen with regard to the meaning of certain phrases in the said article, the two governments have decided to have recourse to the arbitration of his Excellency M. Paul-Honoré Vigliani, formerly first president of the 'Cour de Cassation,' senator, and minister of state of the Kingdom of Italy.

"They do not, however, propose that the whole of the above-mentioned line should be submitted to the arbitration.

"The boundary to the south of the Zambezi may be considered as divided into three sections:

"1. From the Zambezi as far as  $18^{\circ} 30'$  south latitude.

"2. From  $18^{\circ} 30'$  south latitude to a point where the rivers Sabi and Lunde, or Lunte, meet.

"3. From this point to the river Maputo.

"It is not considered necessary to submit to arbitration the line defined in sections 1 and 3; the differences only concern the second section.

"The negotiations took place in London. The text of the treaty was drawn up in English, and initialed by the Marquess of Salisbury, then minister for foreign affairs, and by M. de Soveral, Portuguese minister. The treaty having been compared with the copy initialed in London, was signed at Lisbon by Count Valbom, Portuguese minister for foreign affairs, and by Sir George Petre, Her Britannic Majesty's minister at Lisbon.

"That portion of the article which deals with the second section of the boundary is drawn up in the following terms:

"Thence (i. e., from the intersection of the thirty-third degree of longitude east of Greenwich by the parallel of latitude  $18^{\circ} 30'$  south) it follows the upper part of the eastern slope of the Manica plateau southwards to the center of the main channel of the Sabi, follows that channel to its confluence with the Lunte. \* \* \*

"It is understood that in tracing the frontier along the slope of the plateau no territory west of longitude  $32^{\circ} 30'$  east of Greenwich shall be comprised in the Portuguese sphere, and no territory east of longitude  $33^{\circ}$  east of Greenwich shall be comprised in the British sphere. The line shall, however, if necessary, be deflected so as to leave Mutassa in the British sphere and Massi-Kessi in the Portuguese sphere."

"The following are the terms, in English and Portuguese:

\* \* \* "Thence it follows the upper part of the eastern slope of the Manica plateau southwards to the centre of the main channel of Sabi, follows that channel to its confluence with the Lunte, whence it

\* \* \* "D'ahi acompanha a crista da vertente oriental do planalto de Manica na sua direcção sul até á linha media do eito principal do Save, seguindo por elle até á sua confluencia com o Lunde, d'onde

strikes direct to the northeastern point of the frontier of the South African Republic, and follows the eastern frontier of the republic and the frontier of Swaziland to the river Maputo.

“It is understood that in tracing the frontier along the slope of the plateau no territory west of longitude  $32^{\circ} 30'$  east of Greenwich shall be comprised in the Portuguese sphere, and no territory east of longitude  $33^{\circ}$  east of Greenwich shall be comprised in the British sphere. The line shall, however, if necessary, be deflected so as to leave Mutassa in the British sphere and Massi-Kessi in the Portuguese sphere.”

corta direito ao extremo nordeste da fronteira da Republica Sul Africana, continuando pelas fronteiras orientaes d'esta republica, e da Swazilandia até ao Rio Maputo.

“Fica entendido ao traçar a fronteira ao longo da cristo do planalto, nenhum territorio a oeste do meridiano de  $32^{\circ} 30'$  de longitude leste de Greenwich será comprehendido na esphera Portuguesa, e que nenhum territorio a leste do meridiano de  $33^{\circ}$  de longitude leste de Greenwich ficará comprehendido na esphera Britannica. Esta linha soffrerá tudo, sendo necessario, a inflexão bastante para que Mutassa fique na esphera Britannica e Macequece na esphera Portuguesa.”

“In the month of June 1892, the commissioners of the two governments endeavored to trace the boundary line according to the above-mentioned stipulations, but a difference having arisen between them, the settlement was referred to their governments. Direct negotiations between the ministry for foreign affairs of Lisbon and the foreign office have taken place; but all prospect of arriving at an understanding having appeared impossible, the two governments have decided to have recourse to arbitration.

“These diplomatic negotiations and the technical labors of the commissioners have left the question of demarcation in the following position:

“1. As regards the territory comprised between the parallel  $18^{\circ} 30'$  and a point situated at a distance of a few miles to the south of the Chimanimani Pass, each commissioner has proposed a boundary line, and each Government has adopted the line proposed by the commissioner; whence a difference of opinions has arisen which they have not yet found means of reconciling.

“2. As regards the territory comprised between a point situated at a distance of a few miles to the south of the Chimanimani Pass and the parallel  $20^{\circ} 42' 17''$  of south latitude, the British commissioner and a delegate of the Portuguese commissioner, as far as he was authorized, have agreed upon a boundary line, the examination of which by the two governments has remained unfinished.

“3. As regards the territory which extends from the parallel  $20^{\circ} 42' 17''$  of south latitude as far as the point where the rivers Sabi and Lunte meet, no project of demarcation has been discussed between the two governments.

“In these circumstances, the two governments have agreed to request the arbitrator to take into consideration the documents, the reports of the negotiations, and the results of the technical labors, to weigh the arguments of the two governments, based upon their respective opinions, and to decide on the line which shall separate the Portuguese sphere of influence from that of Great Britain from the parallel  $18^{\circ} 30'$  to the point of confluence of the Lunte and Sabi.

"In faith of which the undersigned, duly authorized by their respective governments, have signed the present declaration, to which they have affixed the seals of their arms.

"Done at London, on the 7th January 1895.

"KIMBERLEY.

"LUIZ DE SOVERAL.

"After our acceptance of the functions of arbitrator it was agreed between us and the two governments that the arbitration proceedings should take place at Florence, and that the documents relating to the arbitration should be drawn up in French.

"We then invited each of the two governments to submit to us a memorandum setting forth its claim, with documents to support it, and a geographical map showing the line of frontier claimed; and we reserved the right to ask them, after the examination of these documents, to send to us technical delegates instructed to furnish us with such information and explanations as would be useful for a thorough comprehension of the facts and localities connected with the questions to be decided.

"For the drawing up of the reports of the proceedings and other work connected with the arbitration, we appointed as our secretary the Marquis Alexandre Corsi, professor of international law at the University of Pisa.

"After the examination of the case presented by the Government of Great Britain on the 16th March, 1896 together with five maps, of which the one marked D shows the line of frontier claimed by Great Britain.

"The conclusions of this case are as follows:

"As regards the first section of the boundary in dispute—

"1. That the watershed between the basin of the Sabi on the one side and those of the Pungwe and the Busi on the other, proposed as the boundary by M. du Bocage, was definitely rejected during the negotiations which preceded the conclusion of the convention.

"2. That a large addition of territory was assigned to Portugal north of the Zambezi, in return for the abandonment by her of the claim to the watershed.

"3. That the plateau mentioned in Article II. of the Anglo-Portuguese convention actually exists much as it is shown on maps published prior to the conclusion of that convention, though its eastern escarpment is in places less sharply defined than it was then supposed to be.

"4. That the British claim leaves the plateau, as was intended, within the British sphere, and the whole of the slope connecting it with the plain within the Portuguese sphere.

"5. That the line of the British claim, following the upper edge of the plateau and drawn across the mouths of the ravines, is in accordance with the text of the convention and is exactly coincident with that in the minds of the British and Portuguese negotiators.

"6. That the deflection round Massi-Kessi of the line of the British claim amply meets the requirements of the case.

"As regards the second section of the boundary—

"7. That the line agreed to by Major Leverson and Captain d'Andrade is the line that should be adopted.

"As regards the third section of the boundary—

"8. That till the Sabi is reached the boundary must run southwards between the limits 32° 30' and 33° of longitude east of Greenwich.



"9. That it is immaterial as regards compliance with the text and spirit of the convention whether the boundary follows the Sabi up or down stream, that river merely serving as a connecting link by means of which to reach its confluence with the Lunte, which had been selected as a fixed point, whence the line was to be carried to the northeastern corner of the South African Republic.

"After the examination, also, of the case presented on the 10th June 1896, in the name of the Portuguese Government, with a volume of the White Book and three maps, of which the one marked C shows the line claimed.

"The conclusions of this case are as follows:

"1. That the frontier from latitude  $18^{\circ} 30'$  south of the defile of the Chimanimani should follow the line proposed by the Portuguese commissioner.

"2. That southwards from Chimanimani to Mapungwana the frontier may follow the line proposed by the British commissioner and accepted by the Portuguese technical delegate, Freire d'Andrade.

"3. That between Mapungwana and latitude about  $20^{\circ} 30'$  south the project of delimitation agreed to between the British commissioner and the Portuguese delegate should be rectified, the frontier to run from Mapungwana by Mount Xerinda towards the mountain situated on the above-mentioned parallel between the basins of the Zona and the Chinica.

"4. That as the plateau does not exist south of latitude  $20^{\circ} 30'$  south, it appears just and reasonable that from this parallel the frontier should run to the Save by Mounts Mero and Zunone and the River Lacati, following after this the course of the Save to its junction with the Lunde.

"At our invitation the two governments sent to Florence and placed at our disposal their delegates, viz: Major Julian John Leverson, on the part of Great Britain; his excellency the Councillor Antonio Ennes, and Captain Alfred Freire d'Andrade, for Portugal.

"The delegates of the two governments after having, on the 16th and 18th of June, been made acquainted reciprocally with the cases and the maps having reference to them, laid before us fully, in a series of meetings which took place in our presence, and of which minutes were drawn up, the circumstances and arguments in support of the claims of their respective governments; and in their discussions they furnished us with the most careful and detailed information and explanations which we deemed it useful to ask them as to the doubts and difficulties which the nature and unexpected configuration of the mountainous and irregular plateau of Manica place in the way of an exact and literal application of the text of Article II. of the convention of the 11th June 1891 to the territory to be delimited.

"In the course of these discussions there were presented to us on the 9th July 1896 'Observations on the British Case,' by M. Ennes and Captain d'Andrade, and 'Notes on the Portuguese Case,' by Major Leverson, and, further, 'Observations on the British Counter Case,' by Captain d'Andrade, as well as some replies in manuscript submitted by one side, and by the other illustrative maps and sections prepared before the close of the meetings by Captain d'Andrade; also a topographical map, submitted on the 14th July by Major Leverson, modifying two small parts of the first section of the frontier claimed by his government.

"Lastly, after the conclusion of the meetings on the 17th August, Major

Leverson submitted to us his 'final observations,' and M. Freire d'Andrade caused to be transmitted to us on the 21st August 1896 his 'conclusions.' All printed documents were communicated by our secretary to each of the delegates, the exchange of each one from one party to the other being as far as possible contemporaneous. The manuscripts and maps were at the same time placed at their disposal.

"I. *Preliminary questions.*—During the study of the documents, and during the discussions, certain preliminary questions presented themselves in the first place to our examination. They have reference to the text of the treaty of the 11th June 1891.

"It is pointed out in the joint memorandum ('Acte de Compromis') that the treaty was originally drawn up in English and initialed on the 14th May 1891 by the Marquess of Salisbury, secretary of state for foreign affairs of Great Britain, and M. Luiz de Soveral, Portuguese minister plenipotentiary in London; that after this the Portuguese text having been compared with the English text initialed in London, the double English and Portuguese text was signed at Lisbon by Count de Valbom, minister for foreign affairs in Portugal, and Sir George Petre, Her Britannic Majesty's minister at Lisbon, on the 11th June 1891.

"These circumstances are confirmed in the cases of the two governments. (*Vide* Part I. of the English Case, and the Portuguese Case, p. 43.) It has nowhere been declared which of the two texts, the English or the Portuguese, should be considered the original of the treaty.

"It results therefrom that each of the two texts contained in the protocol signed at Lisbon on the 11th June 1891 may aspire to the honor of being considered the original, whilst the English text initialed in London constitutes properly the first minute. In any case there can be no doubt that each of the two should serve equally for the interpretation of the treaty.

"To the double text of the original there has been added in the joint memorandum ('Acte de Compromis') a French version of Article II. of the treaty, the use of this language having been agreed to for the arbitration proceedings. But as following this French translation the double English and Portuguese text has been reproduced therein, it is to be imagined that the high contracting parties considered this version as being in all respects equivalent to the double text of the original.

"Nevertheless, the use of two languages in the drawing up of the document could easily cause, as actually happened, namely, in the scientific world at Lisbon, doubts and differences of opinion in its interpretation, and this has been one of the principal causes of the necessity for recourse to arbitration (British Case, paragraph 1).

"The principal questions were: (1) What was the meaning of the expression 'Plateau de Manica?' (2) What was the signification of the words, 'la partie supérieure du versant oriental' ('the upper part of the eastern slope—a crista da vertente oriental')? (3) What was understood by the word 'plateau,' as used in opposition to the words 'pente' or 'versant?' (4) If these last words, 'pente' and 'versant,' were used as synonymous, what is the surface (*table, terrace, or esplanade*) of the plateau properly so called? What is the *pente* or *versant* [*slope*], and what is the *bord* or *escarpement* [*edge*]? (5) Is the expression 'vers le sud' in the French version equivalent to 'southwards' in the English text and to 'na direcção sul' in the Portuguese text, and do these three expres-

sions signify a direction due south or simply *towards the south*, between the east and the west? (6) Lastly, does the expression 'follows the channel' (of the Save) signify indifferently follows that river down or up stream, or does it necessarily signify *follows downstream*?

"All these doubts, and the discussions of which they were the subject, were brought before the arbitrator by means of the cases of the two parties, and in the discussions of their delegates. But it may happily be affirmed that after loyal explanations these doubts have now lost all importance.

"In fact, the parties have been led by their declarations to recognize that by the expression 'Plateau of Manica' the negotiators of the convention of 1891, putting aside the much more restricted definition of geographers, were of one opinion, and had clearly the intention to include not only the administrative district of Manica, bounded by the rivers Munene and Sucuwa, but all the territory which extends south of the Zambezi from latitude  $18^{\circ} 30'$  to the confluence of the Save with the Lunte—that is to say, the whole region, the delimitation of which was traced out by the Anglo-Portuguese Commission, and which forms the subject of discussion before the arbitrator.

"It is in reality to the whole extent of this territory, formed by a series of highlands connected with the ancient plateau of Manica, that the geographical maps published in the two countries interested at the time when the treaty was drawn up, applied the designation 'plateau' of Manica in reference both to the text of Article II. and to the intention of the negotiators.

"The Portuguese Government, in its case (p. 70), with a loyalty which does honor to it, has made the following declaration:

"It is thus incontestable that the Portuguese negotiator had admitted that the plateau did not terminate at latitude  $19^{\circ}$ , and if his proposal of the 19th April had not proved this with sufficient evidence the demonstration would have been completed by the telegraphic instructions which he transmitted subsequently to the minister in London and which are published in the White Book of 1891, p. 196, document No. 200. This document alone settles the question. "As a last attempt," said M. du Bocage, "it would be well to propose to divide the plateau by latitude  $20^{\circ}$ , leaving to us the southern portion." What was this *plateau* which reached latitude  $20^{\circ}$  and extended even beyond it to the south? Evidently it was that of Manica, as there never was any question of any other during the course of the negotiations.'

"This frank declaration, which is strengthened in the Portuguese memorandum by other observations and deductions of great value, leaves no doubt that the plateau of Manica, to which the treaty of 1891 refers, is not at all merely the small country of Manica of ancient geographers, but that it includes all the high ground between latitude  $18^{\circ} 30'$  and the confluence of the Save with the Lunte—that is to say, all the ancient kingdom or Plateau of Manica, together with the *plateau covered with grass* and the other 2,000 to 4,000 feet above the level of the sea († [sic], but the actual words on the map are: *Plateau between 3,000 and 4,000*.—Tr.), which are to be seen in continuation of the Plateau of Manica on Mr. Maund's map, which was certainly under the eyes of the negotiators (British Case, par. 20).

"As to the true signification of the expression '*partie supérieure*' ('the upper part'—'*a crista*') of the eastern slope, the parties came easily to the agreement that in the treaty it can have no other meaning than that of the *line* along which, and generally in a well-defined manner, the plateau commences to descend towards the plain; or, in fact, it is the *upper edge* which separates the table (or surface) from the slope of the plateau, and not the upper portion of the slope of the plateau, situated above the line of its mean altitude. It is precisely along this line or edge that the frontier is to be traced (British Case, par. 21, and Notes of the British Delegate, par. 19; Portuguese Case, pp. 71, 72, and 73). The words '*il suit*' ('it follows'—'*acompanha*') would lose their proper signification if, instead of referring to a line which is to be followed as much as possible, they referred to a zone susceptible in its turn of being delimited by other boundaries.

"This interpretation, which is certainly in conformity with the spirit of the convention, renders the two texts identical, and causes to disappear all difference between the expressions '*upper part*' and '*crista*' of the slope. They can not express, and do not in fact express, anything but a line, and this line could not be any but that which separates the table from the slope ('*pente ou versant*') of the plateau.

"The disputes as to the signification of the words '*plateau*,' '*terrace*,' or '*esplanade of the plateau*—and *edge or escarpment*' of the plateau—were brought to an end by the definitions which were adopted, and were accepted by both parties.

"Thus, the Portuguese delegate, Captain d'Andrade, gave us an exact and complete definition, applicable in general to all plateaux, in the following terms: 'A vast extent of ground which dominates in a manner clearly defined on one or more sides the regions which surround it, and which is connected with these regions by slopes the inclination of which is greater than that of the plateau itself.' A similar definition has been proposed by the British delegate in the British Case (par. 37), on the authority of the illustrious geographer, M. Élysée Réclus, and other very distinguished writers on this subject are not at variance with it.

"It is therefore not necessary, according to modern geography, that the surface of a plateau should be an even and regular plain, as its name would appear to imply; but it may be, and even is, very often uneven, irregular, broken, covered with mountains, peaks, and hills, crossed by valleys, cut up by deep ravines, furrowed by rivers and streams, of which some have no exit from its surface or table, whilst others flow down its slopes and are of necessity cut by the edges of the slopes themselves.

"Such is the configuration of the so-called Plateau of Manica. It is known as one of the most irregular and most mountainous. M. Réclus, adopting the description of the engineer Kuss, who has recently explored this region, and to whom the cases of both parties refer, informs us that it is a *group of mountains*, having the appearance of a plateau (E. Réclus, '*La Terre*,' Paris, 1888, Vol. XIII., pp. 618, 619).

"Every plateau has its *table* or *esplanade* and its *slope* ('*pente ou versant*').

"There is an agreement to call *table* or *esplanade* all the ground which, though inclined and uneven on account of the existence of mountains or hills, maintains a pretty constant and uniform elevation above the level

of the surrounding country, and where the waters flow more or less rapidly on the more or less inclined surface, in their natural direction, ending their course there sometimes by forming lakes, but more frequently discharging themselves over the slopes.

"It is agreed to consider the *pente* or *versant* (*slope*) of the plateau (these two words having been used synonymously) all the steep sloping ground which connects the table of the plateau with the adjacent plain. As the plateau, according to its most correct definition, can slope to one side or the other, it is evident that a mere inclination is not sufficient to determine the commencement of the slope; it must be well marked and general.

"This line which separates the *table* of the plateau from its slope—that is to say, that which marks the extremity of the table and the commencement of the slope ('*pente ou versant*')—is given the name of 'edge' or 'crest of the slope.' Taken in this sense '*la partie supérieure du versant*,' of which mention is made in Article II. of the treaty, is synonymous with the expressions 'upper part of the slope' and '*crista da vertente*.'

"The English expression 'southwards,' which one finds in the same article, is not to be understood as meaning due south, but should be taken in a broader sense as in the direction of the southern side or pretty nearly towards the south. In this sense it is accepted by both parties and is perfectly adapted to the article above mentioned; according to which the frontier from latitude  $18^{\circ} 30'$  to the Sabi, confined between longitude  $32^{\circ} 30'$  and  $33^{\circ}$ , and having to follow the sinuous inflexions of the eastern edge of the plateau, cannot run in a straight line to the south, but has to bend sometimes to the southeast, at others to the southwest. (*Vide Portuguese Case*, p. 82, and Levenson's notes, No. 31.)

"As to the last question, whether, when in a conversation on delimitation one says, *follow a waterway*, it must necessarily mean *follow downstream*; as the two parties continue to disagree, we reserve the solution for the latter part of our award.

"Having thus eliminated the question which we qualified as preliminary, we will now proceed to examine the two lines of frontier claimed by the parties.

"II. *General conditions with reference to the frontier according to Article II. of the treaty.*—We must begin by acknowledging the rules laid down by the convention of the 11th June 1891, for the delimitation of Manica.

"Article II. of this convention lays down that the frontier on leaving the intersection of longitude  $33^{\circ}$  east of Greenwich by the parallel of latitude  $18^{\circ} 30'$ —

"(a) Follows southwards the upper part of the eastern slope of the plateau of Manica;

"(b) As far as the centre of the principal channel of the Sabi;

"(c) Then follows this channel to the point where it meets the Lunde;

"(d) In tracing the frontier along the slope of the plateau no territory west of longitude  $32^{\circ} 30'$  east of Greenwich shall be included in the Portuguese sphere, nor any territory east of longitude  $33^{\circ}$  east of Greenwich in the British sphere;

"(e) If necessary the line shall be deflected so as to leave Mutassa in the British sphere and Massi-Kessi in the Portuguese sphere.

"The final result of the delimitation should be that the whole of the

plateau—that is to say, the table or esplanade—should be adjudged to Great Britain, and all the slope (*'la pente ou le versant oriental'*) should be reserved to Portugal.

"The fundamental rule is not written in the treaty; but it has been admitted by those who drew it up as a natural consequence, and is an essential and necessary condition, as the Marquess of Salisbury declared in a clear and characteristic formula in his reply to M. de Soveral on the 22nd April 1891: 'The plateau for us' (Great Britain) 'and the slope for you' (Portugal).

"This reply was transmitted by M. de Soveral in his dispatch of the 22nd April to his government, which acknowledged it (*vide Portuguese White Book of 1891, p. 188*), and which not only did not protest against this proposition, but did not suggest any expressions to prove that it had other intentions.

"Besides, the Geographical Society of Lisbon, having some time afterwards raised doubts with reference to this, Privy Councillor Ennes, Portuguese commissioner for the settlement of questions relative to the convention, undertook to dissipate them by declaring in a letter which he addressed on the 25th January 1894, to the president of the society (*vide British Case, par. 19*) that 'the idea was to partition Manicaland so that the plateau—or to be more precise, the esplanade—should remain in the British sphere, whilst the slope should be in the Portuguese sphere.'

"There therefore remains no doubt that the formula 'the plateau for Great Britain and the slope for Portugal' has been clearly admitted as a guiding rule for the delimitation of Manicaland according to the treaty of 1891.

"Now, we shall see how these rules have been applied and interpreted by the two governments.

"What we have said of the mountainous and irregular configuration of the high mass to which the name of Plateau of Manica has been given, and the circumstance that the persons who arranged its delimitation from London and Lisbon could only have a very vague and imperfect knowledge of it, are sufficient to explain the serious differences of opinion which arose when it came to the point of applying Article II. of the treaty to ground, which presented at every moment surprises, unknown features, and topographical conditions far removed from what was expected and supposed, both by the authors of the treaty and the delimitation commission.

"The greatest spirit of conciliation would barely have sufficed to overcome all the causes of disagreement. This good spirit, it must be confessed, was not altogether wanting, and its effects may be seen in the part—and not a small one either—of the line of demarcation about which an agreement was arrived at between Major Leverson and Captain Freire d'Andrade. The difference of opinion, however, notwithstanding lengthy negotiations, remains as regards the first and most important part of the frontier as well as regards other portions.

"In order to settle all the points connected with the questions which have arisen, we propose to follow the order adopted in the joint note of reference (*'Acte de Compromis'*). We will therefore divide the line submitted to our arbitration into three sections, viz:

"1. From the intersection of latitude 18° 30' south by longitude 33° east

of Greenwich to a point situated on this meridian at a distance of a few miles south of the defile of Chimanmani. In this section each government has adopted the line proposed by its commissioner during the work of delimitation and claims it before the arbitrator.

"2. From the southern extremity of the first section to the point where the edge of the slope of the plateau cuts longitude  $32^{\circ} 30'$  east of Greenwich. This section having been agreed to by the commissioners of the two governments, Great Britain asks that it should be adopted in its entirety. Portugal accepts the line agreed to in part only; for the remainder she proposes another line.

"3. From the point at which the second section ends to the confluence of the rivers Save and Lunde. As regards this third section no proposal for delimitation having been discussed between the parties, Great Britain in its memorandum claims a line which would run southwards to the centre of the main channel of the Save, and would then follow this channel upstream to its confluence with the Lunde. The direction in which the line should be drawn is left to the decision of the arbitrator, but in no case must it extend to the west beyond longitude  $32^{\circ} 30'$  and to the east beyond longitude  $33^{\circ}$ . Portugal refuses this line, and claims for special reasons another, which, departing from the rules established by the treaty, would run westwards to the Save.

"No geographical map was annexed to the treaty nor to the joint memorandum, and in our opinion there is none which can be adopted as a sure and complete proof of the intentions of the negotiators of the treaty.

"Not even can the map published by Mr. Maund in the 'Proceedings of the Royal Geographical Society,' and submitted by England, lettered A, and which forms the object of the third English conclusion, be considered as a map which was recognized as being accurate, especially as regards its details, during the negotiations.

"Lastly, during the arbitration proceedings no map was produced which was recognized as being entirely accurate by both parties. They discussed much about the importance and accuracy of their maps, but unfortunately these discussions did not lead to any decided conclusion as to the value to be given to one of these maps more than to the other as regards the various features of the frontier.

"It is an inconvenience much to be regretted, for in the absence of a solid and constant basis for discussion we are obliged to follow minutely the two parties through the arguments which they brought forward, and to seek section by section the intentions of the negotiators to make these arguments fit in with the text of the treaty and the facts established by the examination and comparison which we have made of these different maps, and by the impartial observations of a third expert.

"III. *First section of the frontier.*—In undertaking the examination of the lines claimed by the high contracting parties in the first section, we observe, first, that in this section (which is the most important and the most contested, on account of the value attached to the territory) the two governments, not having succeeded in coming to an agreement, either during or after the work done by the delimitation commissioners, now claim lines quite distinct and very distant from each other.

"In fact, Great Britain claims a line which, according to a definition given by the British commissioner in a first memorandum, dated the 29th

April 1893 (*vide Portuguese Case*, p. 38), 'is in parts the crest line of mountains, in others a line joining the summits of the eastern peaks of the ranges which run out eastwards from the main watershed,' and more particularly as regards the district between Mount Vumba and the Mabata Mountains, the British commissioner declares that his frontier 'is a line running nearly due south, and joining the well-defined eastern edges of the mountainous spurs which project in an easterly direction.' (*Vide minutes of the meeting held on the 27th June 1892*, reproduced in the *Portuguese Case*, p. 22.)

"The principal mountains attained by the British line after leaving latitude  $18^{\circ} 30'$  are Panga, Gorongue, Shuara, Vengo, Saddle Hill, Vumba, a peak north of the river Mazongue (2,350 feet), another peak on the Musapa River (5,100 feet), and the col of Chimanimani. All these points of different altitudes are connected by straight lines, which the British commissioner justifies by the observation that straight lines between well-defined natural points form, in his opinion, a good practical frontier.

"The Portuguese commissioner objects to this line—

"1. That it is not a natural line; that it does not follow any edge marked on the ground, that [it] is all artificial, drawn on the map with a ruler, and not in accordance with the nature of the plateau.

"2. That it does not reach the highest points of the mountains where it passes them; that it crosses the edges of the spurs which project towards the east rather than the general mass of the plateau, and that, in consequence, it crosses the eastern slope.

"3. That in drawing straight lines which connect the chains and spurs of the mountains or the peaks, many water courses, mouths of ravines, and broad and deep valleys like that of the Inhamucarara are cut, and also that it is not continuous, as it projects often onto the slope, and descends sometimes to low ground, notably between Vumba and Chimanimani.

"4. That such a line cannot be in accordance with Article II. of the treaty, which requires a natural line traced along the upper part or edge of the slope of the plateau.

"5. That a straight line may be, in the abstract and as a general rule, a good frontier, but that it is not admissible in [the] case in which another direction has been laid down in a convention.

"6. Lastly, that the deflection which the line makes to include Massi-Keesi in the Portuguese sphere does not leave round this village, as it should in accordance with the spirit of the convention, an extent of territory sufficient for the development of its commercial and industrial life, as well as for its military defence.

"After these objections had been made, the British delegate, in a map which he submitted at the meeting of the 14th July, bearing his signature of that date, introduced into his line two small modifications, one of which changes the point of departure from latitude  $18^{\circ} 30'$ , from which it ascends to a peak on the northern spur of Mount Panga, and the other does away with a detour towards Shiromiro between Mount Shuara and Mount Vengo, which did not appear justifiable.

"The Portuguese line follows quite a different direction. It is traced along the crest of the high mountains which form the watershed between the basin of the Save and the basins of the Pungwe and the Busi, and,



starting from Mount Samanga, it follows the watershed to Chimanimani. The Portuguese commissioner maintains that this line coincides with the edge of the eastern slope of the plateau. The table or esplanade would thus remain to the west of, and the slope to the east of, the watershed.

"He points out, besides, that the frontier claimed by Portugal passes through the highest points of the plateau without descending into the valleys or cutting them or their rivers; that east of this line the ground falls, and numerous water courses run from it towards the plain with a rapidity which is in some cases torrential; that it is precisely the declivity of the ground and the direction of the rivers which determine the commencement of the incline and the edge of the slope.

"Great Britain objects to the watershed line for the following reasons:

"1. It has the fault of confounding the most elevated crest line of the plateau with the edge of its slope and supposes that one cannot find the edge till one reaches the summit of its highest chains of mountains, whilst all the mountain chains of Manica, whether turned towards the east or towards the west, form part of the mountainous plateau.

"2. The country immediately east of the line of watershed being composed of mountain chains, and being furrowed by rivers and deep valleys, in accordance with the nature of a mountainous plateau, does not represent a slope, of which it has not the characteristics. It is true that more or less rapid streams flow through it, but the great irregularity and inequality of the table of the plateau suffice to explain the more or less rapid flow of its rivers, and to prove that they traverse the table or surface of the plateau before reaching its edge, which necessarily cuts them. Also, as it is here a question of a mountainous table, it can easily be conceived that it should have a certain inclination before reaching the beginning of its slope, which would be recognized by having a well-defined and general fall.

"3. What is more essential is that the watershed as frontier is in no way in conformity with the text of the convention, which makes no mention of it, even indirectly. The silence of the convention on so important a point is of the greatest value, for it must be remembered that a watershed is such a very usual frontier line, and so excellent a one in a mountainous country, that if the high contracting parties had wished to adopt it they would have made explicit mention of it, as they have done in Article I. of the same convention, in which the watershed is mentioned as the frontier in certain parts north of the Zambezi.

"But there is more than the silence of the convention; there is a formal refusal by Great Britain. During the course of the negotiations the watershed was proposed as the frontier line in the draft which M. du Bocage, minister of Portugal, submitted on the 19th April 1891; and it was refused by the Marquis of Salisbury, the British minister, who insisted on his draft of the 3rd of that month, which contained the proposal of the edge of the eastern slope as the frontier line. This refusal suffices to exclude the possibility that the Marquis of Salisbury, at the time of the conclusion of the treaty, considered the watershed and the 33rd meridian as identic, for between the two lines (no matter what may have been the idea expressed by mistake in Lord Salisbury's dispatch of the 4th February 1891) there exists a difference of several miles.

"So that Portugal invokes to no purpose the expressions contained in that document, and all the more so because she rejected the proposal to follow approximately the 33rd degree of east longitude, which was the principal object of the conversation reported in the above-mentioned dispatch of the 4th February.

"Besides this, it is to be observed that it was on purpose to assure to Great Britain the strip of territory between the watershed and the line of the edge of the eastern slope that Lord Salisbury increased from 18,000 to 60,000 square kilom. the compensation or rectification north of the Zambezi offered to Portugal, which she accepted (British Case, par. 17).

"4. If one agrees with Portugal that the whole portion of the plateau of Manica situated east of the watershed is an *eastern* slope, the portion situated west of this watershed could, with equal reason, be called *western* slope, seeing that the watershed cuts in two the mountainous table which stretches as well to the west as to the east. From this there would result the absurd consequence that the plateau of Manica would have no table, as it would be entirely absorbed by its two slopes.

"Portugal always based its defense on the existence of a great stretch of territory west of the watershed, referring to its maps, which show the River Odzi in the Strait ('détroit') of Umtali (Mutari Port) at a distance of 40 kilom. from that town. But during the course of the discussions Major Leverson proved, and Captain d'Andrade was unable to dispute, that the Odzi is only separated from Umtali by a distance of about 15 kilom. (Major Leverson's final observations, note to No. 7).

"The extent of the plateau west of the line of the watershed is therefore not so very considerable, and this line is only a central crest of the plateau, the table of which necessarily stretches out on both sides, to the east as well as to the west.

"IV. *Examination of the report of the third expert.*—In presence of such a difference of opinion as to the meaning and exactitude of the maps submitted by the two parties—in view of the arguments of an essentially technical character which they deduced from them, all our efforts to render possible an amicable settlement having proved ineffectual—in order to reassure our conscience, we recognized the extreme propriety of having recourse, with the consent of the two parties, to the opinion of an expert specially qualified in questions of geography and topography.

"For this purpose we addressed ourselves to the management of the Military Geographical Institute of Italy, situated at Florence, and, following the advice given to us, appointed as expert the Chevalier Raphaël Vinaj, major of the general staff and chief of the topographical division of the above-mentioned institute. We communicated to him all the documents and maps which had been presented in the name of the two parties, as well as the minutes of the meetings, and we submitted to him the following questions:

"What is, from the intersection of latitude  $18^{\circ} 30'$  by longitude  $33^{\circ}$  east of Greenwich to the col of Chimanimani, the frontier line which follows the upper part of the eastern slope of the plateau of Manica, according to Article II. of the treaty of delimitation of the 11th June 1891? Is it altogether, or in part, the line drawn on the Map D of the British Government? Is it entirely, or in part, the line drawn on the Map C of the Portuguese Government? Is it altogether, or in part, some other line?

"In the last case, what is the line which, with reference to the maps mentioned, should be drawn so as to be in conformity with Article II. of the treaty of the 11th June 1891?

"In submitting these questions in our letter of the 10th October 1896, we invited him to bear in mind the following:

"1. That the watershed, having been proposed by Portugal and refused by Great Britain during the negotiations, and not having been admitted in the text of the treaty, could not be approved as the frontier line agreed to between the high contracting parties, except in so far as it should be found to coincide with the upper part of the eastern slope and the other provisions of Article II. of the treaty.

"2. That from the documents exchanged during the negotiations it appears that the high contracting parties had agreed that the delimitation should be carried out in such a manner as, according to the expression used by Lord Salisbury, to leave the plateau to Great Britain and the slope to Portugal.

"The expert, having carefully completed his task, submitted to us a report, dated 19th December 1896, which proved to us how well founded were the doubts which we had conceived as to the justice of each of the lines claimed as regards the text of the treaty and the avowed intentions of the parties.

"We consider it right to give it in some detail, in order that the conclusions may be understood.

"After having examined with the greatest diligence the various characteristics of plateaux, upper and lower slopes (called by geographers *reclining or upright 'couchés ou debout'*), and their escarpments, and the various acceptations of these words in science, in the practical study of localities, and in the documents submitted for arbitration, Major Vinaj lays down as the basis of his decision the following four postulates or geographical principles:

"1. The upper part or *table* of a plateau, as it is accepted in the largest sense of the word by modern geographers, can be the more irregular the more extensive it is; that is to say, that it may include peaks, mountains, and mountain chains, and that it may be furrowed by valleys and even by deep ravines.

"2. The division between the upper part or *table* of a plateau and its slopes (taken in the sense of the surfaces which unite the plateau to the low-lying region, that is to say, that part of the general slope which is distinguished by the name of 'upright slope' or 'versant debout') can in general be formed by a line (an edge or crest more or less well marked) beyond which the ground falls more rapidly and in a well-defined manner towards the lower region.

"3. The continuity of this line may be broken by valleys or ravines which are the prolongation of those which furrow the plateau and produce real notches.

"4. The surface which forms the slope is not necessarily always even and regular, but may also be composed of various formations, by chains at angles to the longitudinal run of the edge of the plateau, or by valleys and chains parallel to it, which grow gradually lower, and this variety of regular and irregular slopes may be found in one and the same plateau, especially if it is of considerable extent.

"Then Major Vinaj, proceeding to examine the questions submitted to him, adopts, as regards the first question, the conclusions, which he says are identical, of the two commissioners, according to which the frontier should follow the line which constitutes the edge or crest which defines the separation of the table of the plateau from its eastern slope.

"It is in the search for this line of separation that the disagreement between the two commissioners shows itself. It therefore becomes necessary to examine bit by bit the two lines claimed. The reasons which justify this opinion having been developed and discussed at length by the commissioners in their written production, and orally at the meetings, he confines himself to summing up those which he considers of most importance.

"As regards the modified British line, he remarks that, with the exception of the first portion from  $18^{\circ} 30'$  to Mount Venga, and the last portion close to Chimanimani, it is almost an artificial line, which is only justified by the preference which the British commissioner gives to straight lines between well-defined natural points.

"But this preference not having been sanctioned by an agreement, which would have been permissible under Article VII. of the treaty, it is necessary to confine one's self to investigating whether it is in conformity with Article II. And he is of opinion that it is not so, because it does not follow any natural topographical feature, such as the edge of the slope; but that, connecting by straight lines points with project, sometimes considerably, on to the surface which sinks and forms the slope, it often cuts the latter, and descends even occasionally to the region which may be described as that of the lowlands below the plateau. He deduces therefrom that the British line between Mount Venga and the height marked 5,100 feet on the left bank of the Little Mussapa (Map D) is not in conformity with Article II. of the treaty.

"As regards the Portuguese line, the expert remarks that it follows throughout, except in the modified northern portion (*vide* minutes of the meetings of the 13th and 14th July), the crest of the chain which forms the real watershed of the region of this section. As a rule, the edge of a plateau does not coincide with the watershed, as would appear even from the definition of a plateau given by Captain d'Andrade (*vide* section 1, 'preliminary questions'), except in cases where from the watershed the ground falls in a marked and almost uniform manner, or falls gradually, even with short detached spurs, or with parallel chains and valleys, towards the low ground.

"Now, these conditions, after a careful examination of the maps and surveys, both English and Portuguese, are only realized in two places, viz, around the basin in which Massi-Kessi is situated and between Inyamatumba and a point situated due west of Mount Guzane (Portuguese map) on the left bank of the Little Mussapa.

"The watershed chain, which is highest, especially in the southern portion, includes almost everywhere the most pronounced elevations of the country, and, except in the two places above mentioned, is surrounded, not only to the west, but also to the east, by a district remarkably elevated, especially in its northern portion above Mount Venga, in which in reality are found the highest summits.

"The claim to trace the delimitation for the whole length of this section

exactly along the crest of the watershed does not appear to be in conformity with the definition of the plateau and of the slope given by Captain d'Andrade, because one would come to consider as slope all the ground inclined towards one direction, whilst, according to this definition, the table of the plateau may be inclined and the edge of its slope not commence till the point where the inclination of the ground becomes well marked and general.

"And one can not maintain that this crest coincides throughout the section with the edge of the eastern slope, because along the greater portion of it, immediately beyond the crest, there is also to the east a gentle slope, which at a certain point in its fall becomes much steeper (Mount Vumba-Inyamatumba), and which constitutes, therefore, what Colonel de la Noë ('*Les Formes du Terrain*,' Paris, 1888) has called the *upright* ('*debout*') or lower slope, in opposition to the *reclining* ('*couché*') or upper slope, which still forms part of the table of the plateau.

"Therefore neither is the Portuguese line in its entirety in accordance with Article II. of the treaty.

"Thus, having reached the examination of the last question, the expert, with the assistance of a series of sections at intervals of 2' 30", drawn as carefully as possible from the maps, and with the remark that certain elements necessary for this kind of work were wanting, shows that the line which is in conformity with the treaty is in part different from either of the lines claimed by the two governments. He divides it into four parts, and traces it as follows:

"*First part.*—Starting from latitude 18° 30' south, near the confluence of the Garura and the Honde, which corresponds with the narrow gorge between Mount Mahemasemika and the northern spur of Panga on the British map, and immediately below the point marked 760 meters, a little above the said parallel on the Portuguese map, the line ascends to the summit of the above-mentioned spur to Panga. Then, on the British map it runs to the southeast (point marked 3,890 feet) and crosses the River Inhamucarara to the height marked 6,740 feet north of Gorongoe, whilst according to the Portuguese map it runs from Panga to the southeast (point marked 1,257 meters) and crosses the Inhamucarara to the height north of Gorongoe (1,810 meters). Thence it follows the crest of the Gorongoe by Mount Shuara (5,540 feet, British map) to Mount Venga or Vengo (British and Portuguese maps).

"This part of the section may be justified by observing that the basin of the Honde from its sources to the gorge, well defined by the spur of Mahemasemika on the north and that of Panga on the south, forms part of the plateau, because its general altitude is very considerable, and it is inclosed by an extensive and elevated country which evidently forms part of the plateau. The gorge whence the Honde issues must be considered as a true notch in the edge of the plateau, after which the slope descends by an almost uniform gradient to the region of the River Pungwe.

"Descending to the east from the Portuguese line there is no general slope, but the ground after a certain fall ascends again towards the very elevated region of Panga and Gorongoe. Thus it is only beyond this last mountain that the true eastern slope of the plateau commences with a pretty steep inclination.

"The mountain masses Pungwa-Panga and Venga-Shuara-Gorongoe can

not be looked upon as parallel chains forming an integral part of the eastern slope, because their elevation and importance, as well as the general elevation of the lands and valleys which they inclose, show evidently that they still belong to the surface of the plateau.

"And in fact the upper valley of the Inhamucarara, inclosed by these two chains, cannot be considered as a water course of the eastern slope, because, independently of its general elevation, owing to its narrow and little practicable bed, it has altogether the appearance of a true and deep notch in the table of the plateau; and its direction north-northeast is very different from the eastern direction of the slope.

"The objection that this line starts from a very low point on latitude  $18^{\circ} 30'$ , and that this point at first sight does not appear to be situated on the edge or crest one is in search of, is of no weight, because it happens by chance that latitude  $18^{\circ} 30'$  corresponds exactly with one of the deepest notches, which causes the edge to be noncontinuous.

"*Second part.*—Leaving Mount Venga it follows the crest which runs towards the west-northwest and towards the point marked 6,200 feet on Gomoriyangani (British map), or to the east of the point marked 1,620 meters on Mabonde (Portuguese map). Thence, on the British map it follows the line coloured blue, which, following the crest of the above-mentioned Gomoriyangani, reaches Mount Snuta (5,570 feet), Mount Chenadombue (4,700 feet), and the height marked 4,510 feet, and the sources of the Menini, where the col is marked 3,750, by which the road called by the name of 'Selous Road' passes; whilst on the Portuguese map it follows the crest of Mabonde, reaches Mugudo, Lapulare (1,600 meters), Chitumbo (1,530 meters), and passes to the east of Bumbuli, to a point where the spur of Ihamazire projects towards the west. From this point, describing the arc of a circle with its concavity nearly towards the northeast, it joins the spur which runs towards Mount Vumba (or Serra Chitumba on the Portuguese map), cutting the upper valley of the Munene or Menini.

"The justification of this part of the line is as follows: It circles round the region of Massi-Kessi from Mount Venga to Mount Vumba, leaving thus in the Portuguese sphere the upper valleys of the Revue, Zambusi, and Menini, which, being more open and separated by narrow spurs with a steeper fall, form part of the eastern slope.

"The spurs between the Revue and its affluent, the Chua, the one which projects from Chenadombue and finishes at Saddle Hill (British map) or Maritza (Portuguese map), and the one called Clarke's Hill may be classed among the spurs mentioned in the fourth postulate above referred to, and must be considered as forming part of the slope.

"Lastly, the proposed line starting from the col marked 3,750 feet on the British map runs towards Vumba, because to its right and to the south of the valley of the Menini there is such a general increase in the elevation of the ground that it must be considered as belonging to the plateau.

"*Third part.*—Leaving Vumba the line makes several bends, so as to follow southwards the crest of the steepest slope. It crosses the upper valleys of the Zombi or Zombe, of the Mazongwe or Zomoe, reaches Mount Matura at the point marked 4,495 feet (British map), where is situated the trigonometrical point which is shown on the Portuguese map at a distance of 2,500 meters west of the point marked 596 meters on the prolongation

of the Serra Chaura, and then continues, crossing the upper valleys of the Mangwene and Pambe or Ihamatoca, of the Litanti or Bonde, and of the Inyamangwene, to the eastern extremity of Mount Inyamatumba at the point marked 4,650 feet (British map); that is to say, to the southwest of Chabua (Portuguese map).

"This part of the section is justified by the remark that between it and the Portuguese line there is included all the high ground which commences a little south of the Menini, and in which are found the upper valleys and drainage areas of the above-mentioned torrents, and which without doubt forms part of the table of the plateau, whilst the whole way along this line there is an échelon or sensible change of slope which marks the true edge, at which the eastern slope, properly so called, commences. On looking attentively at the British map D one easily perceives the characteristic difference of the ground situated between the streams Zombi, Mazongwe, Mangwene, &c., and that included between the narrow spurs of Saddle Hill and Clarke's Hill, and between the Revue, Zambusi, and Menini, which belong to the slope.

"*Fourth part.*—From Mount Inyamatumba the line, ascending a spur of this chain towards the west, again rejoins the Portuguese line, and follows it along Mount Kokobondira (British map), or Choanda (Portuguese map), to the point marked 1,500 meters (Portuguese map); that is to say, to the northwest of the point marked 5,100 feet (British map). From this point, turning towards the east, it crosses the upper valley of the Little Mussapa, and reaches Mount Guzane (Portuguese map), rejoining, after cutting off the angle made by the English line, longitude 33° east of Greenwich, and following it to Chimanimani, after having crossed the Great Mussapa.

"This last part of the line proposed is justified as follows:

"The same reasons for which the Revue, the Zambusi, and the Menini were acknowledged as water courses of the slope, force one to the conclusion that the Mangwingi (British map), or Munhinga (Portuguese map), can not be a water course of the plateau. The same must be said of the other torrents farther to the south, as far as the Little Mussapa, with the exception, however, of the last mentioned; because the upper valleys of the Little and the Great Mussapa form part of a region much more elevated, and which belongs to the plateau by the admission of both parties. The line once having reached the 33rd meridian follows it to the south in accordance with the stipulation of Article II. of the convention, which forbids that the line should cross this meridian for the benefit of Great Britain.

"The learned and careful report of the honorable expert has thus brought into relief all that is improper in the lines of the two governments, and in rectifying them has proposed to us a third line, which, having been examined by us with the greatest care, and compared with those of the two parties, appears to us to be exempt from the faults which have always been evident to us in both of them, and which prevented us from pronouncing ourselves in favour of one or the other.

"We have in fact, in the proposal of the expert, a natural line, which, in its tortuous course, conforms as far as possible to the mountainous configuration of the plateau, and which, following the heights which define it and form its eastern slope, runs along the upper part or edge of this slope.

It therefore only cuts those water courses and valleys, which, in consequence of the elevation of the ground, must form part of the table of the plateau; and it leaves in the slope the others, which have a lower altitude and steeper gradient.

"We may add that this line is a just application of the treaty, as it does not adopt as frontier the watershed except in those places where it is proved that it coincides with the edge of the plateau, which is in conformity with the letter and spirit of Article II.

"So we see that in its *ensemble* this line encroaches neither on the surface of the plateau nor on that of the slope, but that it fulfills, as far as the irregularity of Manica allows, and as is possible with the maps submitted, the final object of the delimitation, summed up in the words 'the plateau for Great Britain and the slope for Portugal.'

"Furthermore, this line leaves in the Portuguese sphere the whole district of Massi-Kessi, running along the summits of a kind of mountainous amphitheatre, which seems to have been made by nature as a territorial limit and rampart towards the west.

"The aspirations of Portugal with respect to this had an insufficient guarantee in the text of the treaty, and the intentions of the negotiators were not clearly enough manifested to serve as a basis for a judicial decision. But we have, nevertheless, recognized that these aspirations find their foundation in a happy correspondence between a line traced by nature and the inspirations of equity.

"For all these reasons the line proposed by the expert appears to us to possess all the characteristics required by Article II in the frontier between the spheres of influence of the two countries, and seems to be the only one which is in conformity with the letter and spirit of the treaty. Consequently, we should be inclined to adopt it in its entirety with full conviction.

"But on reflection we find that the trace of the line proposed by the expert from Mount Vumba to Inyamatumba, though technically accurate, might, owing to its numerous inflections and the difficulty of defining accurately its course on maps giving so little detail, whether it be on account of their small scale or the rapid system of survey adopted, easily give rise, on ground as irregular as it is, to doubts and differences of opinion which should be carefully avoided.

"In consequence of this we considered it desirable to ask the same expert to point out to us in this locality a better-defined and more practical line.

"In accordance with our invitation, of which he recognized the opportuneness, the expert pointed out slight modifications which might be introduced into his trace, substituting some nearly straight and better-defined lines for the natural inflections of the edge of the slope, but in a manner so that the extent of ground which each party gets by the substitution of straight lines for the rigorous demarcation of the edge remains almost equivalent.

"He proposes, in consequence, that from Mount Vumba the frontier shall run in a straight line to a trigonometrical point situated between 4 and 5 kilom. to the east of the watershed (Serra Chaura), and from this point that it should continue in a straight line to a point marked 4650 at the eastern extremity of Inyamatumba. Thence it would follow this mountain and rejoin the line already proposed.



"These modifications appearing to us to be in accordance with the aim of rendering the delimitation easier, more practical, and better defined, we have made our decision accord with them.

"Following the division adopted in the joint note of reference, we add, to complete the first section of the frontier, that after Chimanimani the frontier continues to follow, without doubt, the 33rd meridian to the point marked A on the British map, some miles south of the defile of Chimanimani.

"V. *Second section of the frontier.*—The joint note of reference informs us that, as regards the second section of the frontier, an agreement was entered into between Major Levenson, the British commissioner, and Captain d'Andrade, the delegate of the Portuguese commissioner, on the very ground which they were to delimit.

"This agreement is admitted in the cases which the two parties have presented to us, but with this difference, the British Government maintains it, and claims the adoption of the whole of it, whilst the Portuguese Government, basing itself on Article 15 of the regulations for the execution of the delimitation signed at Mozambique on the 24th October 1891 by the commissioners of the two countries, insists that the acceptance of the agreement signed by Captain d'Andrade, the technical delegate, could not be definitive and obligatory on him, unless he gave it his approval, which he did not do before the arbitration.

"In fact, it is not for the first time in the case presented to the arbitrator that the Portuguese commissioner declared that Portugal approves the Levenson-D'Andrade agreement, *even in part only*, viz., from Chimanimani to Mapungwana (Portuguese Case, p. 98).

"In support of this partial approval the Portuguese commissioner remarks that in the portion which he has accepted the delimitation agreed to is exactly in conformity with article II. of the treaty until about latitude 20°; that south of this parallel, till about latitude 20° 30', the relief of the ground is so irregular that it is difficult to apply to it the rules of article II.; that *the table and the slope* of the plateau are there so badly marked, on account of the irregularity of the river system and the absence of well-defined general lines in the configuration of the ground, that it is almost impossible to determine with precision what is the line which separates them—that is to say what is the edge of the eastern slope. It was only by a spirit of conciliation, according to him, that the serious questions which presented themselves in the delimitation were eliminated, because 'the ground lends itself to be *interpreted* in different ways' (Portuguese Case, p. 93). Lastly, in this portion, the line agreed to, even in the opinion of those who traced it, does not follow the crest of the slope (*vide* observations on the British Counter Case, No. 32, *et seq.*), so that here the rules of Article II. were only followed as far as it was possible.

"In other words, though this demarcation may, perhaps, not be absolutely correct, the Portuguese Government acknowledges that the ground in this instance does not admit of any other, the accuracy of which would be less open to dispute.

"But it thinks the same can not be said of the prolongation of the line from Mapungwana to latitude 20° 42' 17", and it therefore rejects this last part of the agreement, and proposes to substitute for it a new line which would follow the mountains of Xerinda to Mount Zuzunye, and which,

passing through the altitudes marked 990, 1,150, and 960 meters, which separate the basin of the Zona from that of the Chinica, would be naturally determined by the orographical relief. This line, Portugal adds (Observations on the British Case, No. 68), avoids the useless detour made by the line agreed to, which, from Mapungwana, runs toward the south-east across the Inhamazi, to reach a height marked 1,100 meters, and then descends to altitudes of 670 and 760 meters. And, whilst it is almost rectilinear, it preserves a mean altitude of 1,110 meters, and has a greater regularity than that of the line agreed to.

"The British Government, as we have said, claims the maintenance of the whole of the agreement, according to which the line, having reached Mapungwana (point marked H on the British map), makes a sharp angle, turns to the southeast, and runs straight to a well-marked hill east of the river Zoma, or Zona, and then continues to a point situated on the range which separates the valley of the Zoma from that of the Sheneyka, or Chinica, after which, turning almost due west, it runs in a straight line to the summit of Mount Zuzunye.

"Against the adoption of the rectification claimed by Portugal Great Britain advances two objections—one legal and the other technical.

"The legal objection consists in the special character of the Levenson-d'Andrade agreement. It is admitted on both sides that this agreement, taken as a whole, represents a transaction discussed and accepted on the ground itself in consequence of mutual concessions by technical experts who had acquired a personal knowledge of the localities, and were very competent to form an opinion of their topographical characteristics.

"The above-quoted description which Portugal has given of the very irregular and hilly country which the line agreed to traverses to Mapungwana enables us to understand clearly how much give-and-take was necessary to enable this line to be traced. The British commissioner declares that in the desire to arrive at an immediate solution he decided to accept the modifications of his first proposals suggested by Captain d'Andrade, though he felt convinced that the first line corresponded more accurately to the terms of Article II. of the treaty.

"The extent of the concessions made by the British commissioner is shown on the British map D, on which the dotted red line represents the frontier at first proposed by him in those places where it does not coincide with the line agreed to, viz, from C to K. One sees from this map that the portion *accepted* by the Portuguese delegate is very important; he declares himself, in his case (p. 93), that it is *the greater portion of the delimitation* which was agreed to. It is just there that the largest concessions were made to him; of these concessions he wishes to take advantage.

"Besides, the manner in which this compromise was effected is explained to us even by Captain d'Andrade in terms which it may be useful to quote: 'The Levenson-d'Andrade line' (says he, at No. 100 of Observations on the British Case), 'was traced by making mutual concessions; there was the Levenson line and the d'Andrade line, and after prolonged discussions on the ground, in order to afford proof of a spirit of conciliation on both sides, the line above mentioned was determined on, though each was persuaded that his line was more in conformity with the text of the convention.'

"The language of the delegates of the two governments affords evidence, therefore, that the whole line agreed to was the result of a compromise or of a transaction which could not be repudiated without going against the intentions of its authors, and without wounding justice at the expense of one or the other of the parties. Of this agreement one must say that it must be taken in its entirety or dropped altogether. Portugal, which accepts the greater part which is to its advantage, can not reject the other to the disadvantage of Great Britain without evidently disturbing the balance of justice and deranging the equilibrium between the parties.

"The want of full powers as regards the Delegate d'Andrade, to which Portugal calls our attention in many memoranda which are included in its case, even if it were proved in an irrefutable manner, could not be accepted as an argument in favor of Portugal, except in the event of that power rejecting the agreement altogether and proposing a new line in lieu of the whole of the one agreed to.

"But Portugal pretends that in this matter it only makes its line conform to the convention.

"Great Britain contests this statement by the second objection, which we have described as technical. Its delegate at No. 15 of his *final observations* remarks that the Portuguese line from Mapungwana to Mount Zuzunye, *is, it is true, a natural crest line, but it is a crest situated on the plateau and not the edge of the plateau.* On examining the English map D one sees in fact that the slope from this crest to the northwest towards the Umswilizi is much more rapid than the general slope on the other side towards the southeast and the district of the Umswilizi (or Moussurize), which river, even according to Captain d'Andrade, is without doubt a true river of the plateau. (*Observations on the British Counter Case No. 68.*)

"The Portuguese Government seeks here, it would appear, as in the first section, for the edge of the slope on the most prominent heights, and again confounds a crest line of the plateau with the crest or edge of its slope. If the line of the eastern edge descends to a lower altitude in this locality, it is the natural effect of the gradual depression of the whole plateau of Manica, which is seen to the west of the line on proceeding southward from the Lusitu. This general inclination of the country and of the table of the plateau itself must not be confused with the slope ('*pente on versant*') which becomes lower naturally with the lowering of the plateau.

"One must have before one, besides, the avowal of the parties (to which we have already drawn attention) that this section of the line is the result of mutual concessions, so that if in its course there should be some features not altogether regular or in conformity with the exact application of Article II. of the treaty, these irregularities compensate each other reciprocally; and if beyond Mapungwana there is some advantage for Great Britain, Portugal has, on the other hand, large compensation in the concessions which were made to it in the much greater portion which precedes Mapungwana and in that which follows [*sic?*].

"We consider, then, well founded the two objections of Great Britain. Though they be essentially distinct they afford mutual support to each other, and the two together bring us to the conclusion that the partial acceptance of the agreement, together with the modification proposed by Portugal between the point *H* and the point *M*, is as contrary to the prin-

ciples of justice as to the rules of Article II. of the treaty. For this reason the agreement ought, in our opinion, to be maintained as far as Mount Zuzunye.

"As regards the last part of this section to the point *O*, we will discuss it when we examine the third section, to which this part was united during the discussion by the delegates.

"VI. *Third section of the frontier.*—The line once carried by the delegates of the two governments to the summit of Mount Zuzunye, a great divergence of opinion arises as to the interpretation and application of the convention to the ground which remains to be delimited before the Save is reached.

"For the British Government, on leaving the summit of Mount Zuzunye (point marked *M* on the map *D*), the line crosses the valley of the Umswilizi to a high point on the watershed which separates the valley of the Nyamgamba from that of other affluents of the Umswilizi (which are all rivers of the plateau), and follows the line of the agreement to the point *O*, where it meets the meridian  $32^{\circ} 30'$ .

"This small part of the frontier is the last section of the line agreed to by Major Leveson and Captain d'Andrade, and one must in consequence apply to it all the remarks which we have made above on the indivisibility of the proposed agreement as a bilateral transaction which admits of no alteration. The appreciable fall of the whole plateau in this part and its deviation to the southwest naturally cause the line, which runs along its eastern edge, to bend toward the west as far as meridian  $32^{\circ} 30'$ ; then stopping at this meridian, fixed as the extreme western limit by Article II., it follows it to the Save, leaving in the Portuguese sphere all the territory situated east of the aforesaid meridian.

"We consider it opportune to remark here, that the agreement having caused the line to recede to the west, the result is that in its course from the point *M* to the point *N*, it causes to be included in the Portuguese sphere the triangle *LMN*, the importance of which is seen on the Map *D*, and the whole of which triangle forms part of the district of the Umswilizi, which is situated on the plateau. This is, then, another considerable concession to the advantage of Portugal.

"The English line taken as a whole in this last section would be in conformity with the conditions required by the treaty, viz, that the direction towards the south follows the deviations of the edge of the plateau, and the limitation of the parallel [*sic*]  $32^{\circ} 30'$  to the west.

"The Portuguese Government, on the contrary, considers itself authorized by the configuration of the country in this part to follow quite another direction, and deviate from the conditions laid down in the treaty.

"Taking as a basis the supposition that the depression of the country between the latitude of Mount Zuzunye and the channel of the Save is so marked that the Plateau of Manica and its slope cease altogether to the south, the deduction is drawn that the frontier can no longer follow its eastern edge towards the south. There arises, says Portugal, a case not foreseen, or omitted in the treaty, for the treaty supposes that the plateau is prolonged southwards to the Save. From that moment the rules laid down in Article II. cease to be applicable, and they must be supplemented by having recourse to the general principles of diplomatic interpretation, according to which when in a delimitation convention it is stated that a

line has to go from one point to another, without specifying the course, it must proceed there straight by the shortest route.

"In applying this rule to the supposed case the Portuguese commissioner maintains that the frontier being unable to run *southwards* to the Save as required by the treaty, it must proceed thither westwards by the shortest route, so as to follow the course of the river downstream to its confluence with the Lunde. He adds that this would be in conformity not only with the intention of the negotiators, who only had in view to leave all the plateau to Great Britain, but also with the principles of justice and equity, which militate [*sic*] in favor of Portugal, and lastly with the expression used in the treaty, "follows this channel to its confluence with the Lunde," as *follow a water course*, according to him, signifies rather *follow downstream* than *upstream*, which the English line would do.

"Rejecting on account of these arguments the line proposed by Great Britain, Portugal considers it *just and rational* that the frontier from about  $20^{\circ} 30'$  should run to the Save by Mounts Nero and Zuzunye and by the River Lacati, following thence the course of the Save to its confluence with the Lunde.

"And as this line would extend beyond  $32^{\circ} 30'$ , an endeavor is made to overcome this difficulty by remarking 'that the meridians  $33^{\circ}$  to the east and  $32^{\circ} 30'$  to the west only figure in the treaty as limits which the frontier in its course must not cross so long as it is a case of tracing it along the edge of the eastern slope of the plateau; hence, he concludes, these limits count for nothing in the delimitation of a country in which the plateau and the slope are wanting.' (Portuguese Case, p. 97.)

"The reasoning, of which we have above given a summary, appears to us rather specious than solid, and to be founded really neither on fact nor on right. Two questions are raised by it taken as a whole: (1) Whether the Plateau of Manica really ceases to exist in the south before reaching the Save; (2) whether if the answer be in the affirmative the deductions drawn therefrom are legitimate.

"1. We will commence by remarking that the topographical officers who settled in agreement the frontier from the point *M*, the summit of Mount Zuzunye, to the point *O*, where the edge cuts  $32^{\circ} 30'$ , must have recognized in this stretch the existence of the plateau and the slope, which was a necessary condition of the line adopted.

"Major Levenson remarks (No. 30 of his Notes) that the supposition of the treaty that the slope of the plateau, without ceasing to be an eastern slope extended to the Save, was perfectly justified by Mr. Maund's map, in which it will be seen that the edge of the plateau after having crossed meridian  $32^{\circ} 30'$  runs in a direction nearly southwest to the Save; and that, in fact, the examination of the ground proved that the general deflection west of this meridian given to the edge on this map is not very inaccurate. He adds that he does not in any way admit that the plateau ceases to exist south of Mount Zuzunye, as this mountain is situated, he says, to the east even of the great watershed, and precedes [*sic*] the triangle *LMN*, the whole of which is included in the district of the Umswilizi (or Moussurise) which river, by the admission of Captain d'Andrade, even as we have already remarked, is a true river of the plateau.

"The considerable diminution of elevation of the high lands of Manica before reaching the Save is, according to Portugal, a proof that the pla-

teau has ceased to exist and that its place has been taken by the plain; but while recognizing the diminution in altitude we are of opinion that it is not sufficient to do away with the characteristics of the plateau. In the first place, it must not be forgotten that the Plateau of Manica (like the plateaux of Africa in general), by the admission of the parties and according to the observations of geographers and travellers, is highest to the east and falls gradually to the south and west; but this natural fall does not deprive plateaux of their characteristics. In fact, the British delegate, whilst acknowledging that the portion of the Plateau of Manica south of the latitude of the intersection of its edge by  $32^{\circ} 30'$  is less elevated than the country further to the north, maintains that this does not prevent its being still considered as part of the table of the plateau. He explains and supports strongly this proposition by remarking that the diminution in the general altitude of the country to the west on proceeding southwards from the Lusitu is caused by the gradual lowering of the whole plateau from Mapungwana, and by the manner in which, on approaching the Limpopo, it recedes towards the southwest; but this general inclination of the ground does not justify one in seeing in it an exterior slope—that is to say, a slope connecting the plateau with the plain—and much less the commencement of the plain.

"It is admitted by geographers that the surface of an elevated district may have a general slope of this kind without necessarily ceasing on that account to be a plateau. The authority of M. Élysee Réclus furnishes an example of this in his work already referred to ('La Terre,' Vol. I., 2nd edition, p. 137), in which he informs us that 'the greater portion of the high lands of Africa are of little elevation, and their slopes offer an easy means of access; thus the plateaux of Cape Colony, the mean altitude of which in the south is barely 200 meters, rise by degrees towards the north to an altitude of 600 to 1,000 meters above the level of the sea.'

"This observation is perfectly applicable to the high lands of Manica, which undoubtedly rise in the north to more than 1,000 meters, whilst in the south, a little before arriving at the Save, their altitude is not more than 300 meters. (Observations on the British Counter Case, No. 12, and conclusions of the Portuguese delegate, No. 4.)

"One more observation will complete this demonstration. It is generally acknowledged, even by Captain d'Andrade (Observations on the British Case, No. 71) that 'the definition of "plateaux" is susceptible of a certain elasticity on account of the somewhat unrestricted use made of the word.' Geography, then, does not fix any *minimum* for its altitude. This *minimum* depends on the country which surrounds it and on the particular conditions of each region. We have just called attention to the fact that, according to the evidence of M. Réclus, 200 meters are sufficient to constitute a plateau in Africa. This opinion we find shared by M. Ritter (mentioned among other writers in the Portuguese Case, p. 48), who considers an elevation of 500 feet (about 160 meters) as being the lowest limit of the level of a plateau. Also Captain d'Andrade, in his Conclusions (No. 4), acknowledges that according to Réclus there may be a plateau of an altitude of 50 metres, and that according to the illustrious Italian geographer, Marinelli, the minimum altitude of a plateau is 200 meters (Marinelli 'La Terra,' Vol. I., p. 302).

"In our case the rule of legal interpretation, according to which the expressions made use of in a contract must be taken in the sense most in accordance with the intentions of the parties who have arranged it and the most favorable to the aim of the contract, obliges us to give to the word 'plateau' the broadest possible signification—that is to say, to require only the minimum normal altitude—so as to be able to affirm its existence as far as the Save, as the high contracting parties had supposed, and so as thus to render possible the application of the text of Article II. of the treaty. Following thus, from the legal point of view, an universal rule of interpretation, and from the technical point of view the opinion of the most illustrious geographers to whom the two parties have made reference, we come to the conclusion that the Plateau of Manica, though it falls gradually towards the south and becomes reduced to the smallest proportions, preserves, nevertheless, a sufficient elevation (as was supposed by the authors of the treaty) for it to be admitted that it exists right to the Save.

"2. Lastly, to examine the question under all its aspects, we will suppose, with Portugal, that the plateau, contrary to the anticipation of the authors of the treaty, comes to an end at a distance more or less great before reaching the Save. The consequences which would result would certainly not be those which Portugal tries to deduce therefrom.

"The direction that the line must have towards the south would not cease, and the limits of the meridians, within which it must maintain its course, would remain the same; therefore, one can not even say that there has been proved to exist a case that was not foreseen, or a gap in the convention.

"In fact, as regards the direction of the line towards the south, it is sufficient to reflect that it is the only one which is laid down in Article II. of the treaty as a general rule for the tracing of the whole of the frontier between 18° 30' and the Save. The words 'southwards to the centre' of the English text, as well as the words 'na sua direcção sul ate á linha media' of the Portuguese text, signify 'towards the south to the centre,' and not merely 'towards the Sabi.' (*Vide* Major Levenson's Observations, No. 18.) It is true that the article says at the same time 'follows the upper part of the eastern slope of the plateau;' but by these words it was not intended to convey that the line should only run towards the south, provided it could, and as far as it could, follow the edge of the slope, as the Portuguese delegate makes out, but simply that the frontier in running southwards to the Save should follow the naturally tortuous course of the edge and not proceed there direct in a straight line.

"This is evidently only a condition imposed on the trace and not on the direction of the line, which must, before everything, run towards the south; only in running southwards to the Save it must follow the edge of the eastern slope; but if the edge, which is supposed by the treaty to extend to the channel of the Save, comes to an end before reaching there, this flexibility of the trace comes necessarily to an end at the same time as the edge, as a condition which has been fulfilled; and from the point where the edge finishes, the line, freed from all restraint, must run straight to the Save, according to the general rule of its direction towards the south, to the application of which, moreover, no obstacle presents itself.

But it must not pass to the east beyond longitude  $33^{\circ}$ , nor to the west beyond longitude  $32^{\circ} 30'$ , for the reasons which we are now about to explain.

"This is the only rational interpretation, the only one that is in conformity with the text of Article II., and with the intentions of its authors.

"The objection that the text supposes the plateau to extend to the Save can in no way shake this conviction.

"The authors of the treaty, by the admission of the parties, had only an imperfect knowledge of the plateau which they delimited. Now, even if they did make a mistake, this mistake, which does not affect one of the essential conditions, but only the flexibility of the line to be traced, cannot make any difference as to its final direction towards the south, which can and must be followed notwithstanding.

"Further, this conviction held by the negotiators that the plateau extended to the Save, though erroneous, would furnish evident proof that by the words '*the frontier follows southwards*' the upper part of the eastern slope to the Save,' they meant simply that the frontier runs southwards to the Save *throughout its length*, which expression for them was identical with the extent of the edge.

"As regards the limitation of longitude  $32^{\circ} 30'$  we are of opinion that Portugal would not have the right to free itself from it by supposing that the plateau ceased before the Save was reached.

"If one seeks the cause of and the reasons for this limitation, one easily understands that it is entirely independent of the continuity of the edge as far as the Save.

"It appears from the history of the negotiations which preceded the drawing up of the treaty that the Marquess of Salisbury had first proposed to make longitude  $33^{\circ}$  the frontier from  $18^{\circ} 30'$  to the Save; that Portugal, not having accepted this proposal, nevertheless declared through its minister, M. du Bocage, that it could agree to  $32^{\circ} 30'$  as a dividing line, provided that attention were paid to the modifications required by the geographical conditions. (British Case, para. 13.) The two proposals reduced the difference between the two lines to the strip of territory comprised between longitudes  $32^{\circ} 30'$  and  $33^{\circ}$ . It was, then, in order to reconcile this difference that Lord Salisbury submitted a kind of compromise which instituted as frontier line the upper part or edge of the eastern slope from  $18^{\circ} 30'$  to the confluence of the Save with the Lunde.

"This means of conciliation was accepted by Portugal, and adopted in Article II. of the treaty.

"But, foreseeing naturally that the edge of an irregular mountainous plateau, like that of Manica, would be tortuous in its development, the negotiators deemed it necessary to lay down that the frontier, whilst following the sinuous course of the edge, should never extend beyond the limit proposed by the two parties, viz, meridian  $33^{\circ}$  to the east, proposed by England, and meridian  $32^{\circ} 30'$  to the west, proposed by Portugal.

"Thus the line came to be, so to say, shut in in the groove bounded by the two meridians, with the double object that it should not leave the strip of territory in dispute, or assign to either party more than it had asked for.

"It is precisely this which was agreed to in the following paragraph of



Article II.: 'It is understood that in tracing the frontier along the above slope of the plateau no territory west of longitude  $32^{\circ} 30'$  shall be included,' &c. This line, then, *throughout* its length can not extend beyond the limits above mentioned; if it is mentioned that its trace is along the slope this is only for the simple reason above mentioned, that the negotiators of the treaty were fully persuaded that the edge of the slope extended as well as the line towards the Save. If by chance it has been found that the edge comes to an end before reaching the river, this circumstance does not do away with the *raison d'être* of the limit of the two meridians, and does not prevent the line, when running straight to the Save after the supposed cessation of the edge, from remaining in the groove which the parties fixed for it by expressions which contain a clear and absolute prohibition.

"The impossibility of tracing the line between those limits (as has been observed by the British delegate) would be the only reason which could be invoked for overstepping them; but such impossibility is so far from having been proved that it has not even been alleged by Portugal.

"The only effect which the cessation of the plateau before reaching the Save can have to the advantage of Portugal is to give to the Portuguese sphere its greatest possible breadth towards the west by extending it till it reaches  $32^{\circ} 30'$ , the extreme limit. Just as Great Britain immediately south of Chimanimani has acknowledged that it can not follow the plateau in its detour beyond  $33^{\circ}$ , so Portugal has no right to follow the slope ('*le versant on la pente*') or the plain beyond  $32^{\circ} 30'$  in face of the explicit prohibition in the treaty.

"Finally, it must not be forgotten that Great Britain, to make sure that the frontier should not cross  $32^{\circ} 30'$  and should not trespass on its sphere beyond this limit, made, as we have already more than once remarked, the concession of a large extent of territory north of the Zambezi to Portugal to indemnify it for the loss which it would sustain on the plateau of Manica. Now, it would be contrary to the principles of justice that Portugal in crossing this limit should take back part of the territory in exchange for which it had accepted the above-mentioned compensation. It is true as regards this concession, or, it would be better to say, this arrangement, that Portugal did not fail to raise objections both as to the value and the rights of Great Britain as regards the ceded territory. But we must repeat that we have already had occasion to remark that Portugal, after having accepted by the treaty this territory as equitable compensation, can not be permitted to raise objections, for which besides it has furnished no justification, having confined itself to simple allegations.

"There remains only the last argument of Portugal deduced from the phrase 'the frontier follows the channel of the Save to the point where it meets the Lunde,' which is held to signify that the frontier reaches the Save *above* its confluence with the Lunde, and that consequently it must reach it before its (the Save's) arrival at the Lunde. This argument is destroyed by the fact that according to the convention, the line being obliged to enter the Save before reaching meridian  $32^{\circ} 30'$ , this meridian intersecting the Save below its confluence with the Lunde, it must necessarily have been understood that to reach the confluence of the Lunde the Save would have to be ascended.

"But apart from the question whether the expression 'to follow a river upstream' be rigorously accurate from a philological point of view, it is certain that in the diplomatic and technical language of the delimitation convention, to follow a river, or stream, is made use of with the meaning to follow *upstream* as well as to follow *downstream*.

"The British delegate furnished in his notes (No. 3) a proof of this by quoting the act of delimitation of the Turco-Greek frontier signed at Constantinople by the Mixed European Commission on the 15th (27th) November 1891 (*sic*: should be 1881). (See Vol. III of the *N. Raccolta dei Trattati e delle Convenzioni fra il Regno d'Italia e i Governi Esteri*, Turin, 1890, pp. 99, *et seq.*, Articles I. and II. of the convention referred to, where evidently the words 'suit' (follows) and 'suivre' (follow) the *thalweg* of a river are used to signify follow *upstream*.)

"Many other examples could be quoted, but this is superfluous, once the Portuguese delegate has himself declared in his observations on the British Counter Case (No. 32 *b*) that even if the natural interpretation of the words 'to follow a river' is to follow it *downstream* 'this is not absolutely necessary.'

"To sum up, we are of opinion that the pretension of Portugal to lay aside Article II. of the convention beyond Mount Zuzunye and to substitute for it general principles in matters of delimitation is justified neither by fact nor by right, and that the line which should be adopted in this section is that traced on the British map D, and which had been agreed to by the delegates of the two governments as far as the point at which it meets 32° 30'. That the line should be continued thence along this meridian to the Save is a necessary consequence of this.

"For these reasons:

"We declare that according to Article II. of the treaty signed at Lisbon on the 11th June 1891 the line which should separate the spheres of influence of Great Britain and Portugal in Eastern Africa south of the Zambezi, from latitude 18° 30' to the confluence of the Save (or Sabi) with the Lunde (or Lunte) should be drawn as follows:

"1. As regards the first section of the frontier in dispute, according to the designation used in the joint note of reference ('Compromis') the line on leaving the point where latitude 18° 30' intersects longitude 33° east of Greenwich runs due west to a point situated at the intersection of 18° 30' by a straight line drawn from the *stone pinnacle* on the crest of Mahemasemika (or Massinique) and a height on the northern spur of Mount Panga, marked 6,340 feet. From this point of intersection on the parallel of latitude it ascends in a straight line to the above-mentioned point marked 6,340 feet; then, after following the watershed to a point marked 6,504 feet, it runs in a straight line to the summit of Mount Panga (6,970). From this point it runs in a straight line to the point marked 3,890 feet, and thence it runs also in a straight line, crossing the River Inyamkarara (or Inhamucarara) to the point marked 6,740 feet, situated to the north of Mount Gorongoe.

"After this it follows the watershed, passing through the points marked 4,960 feet and 4,650 feet, till it reaches the summit of Mount Shuara or Chuara (5,540 feet), and then, following the watershed between the Inyamkarara and the Shimezi or Chimeza (3,700 feet), reaches the trigonometrical point marked on Mount Venga or Vengo (5,550 feet).

"From Mount Venga it follows the watershed between the upper valley of the Inyamkarara and the Revué, and subsequently that between the Revué and the Odzi, as far as the point at which the spur branches off which forms the watershed between the Menini (or Munene) and the Zombi (or Zombe), whence it follows the crest of this spur to Mount Vumba (4,950 feet).

"From Mount Vumba it runs in a straight line to the trigonometrical point situated on the Serra Chaura between 4 and 5 kilom. east of the main watershed, and thence in a straight line to a point situated at the eastern extremity of Serra Inyamatumba (4,650 feet).

"From there it follows the watershed, which incloses on the north of the valley of the Mangwini (or Munhinga), till it rejoins the main watershed between the Save and Revué. It follows this watershed to the point where the small spur branches off which incloses on the north the upper valley of the Little Mussapa (or Mussapa Pegueno), and runs along the crest of this spur to the point marked 5,100 feet, whence it runs due east, crossing the Little Mussapa, and reaching the crest of the eastern slope of Mount Guzane, which it follows till it meets the meridian of longitude  $33^{\circ}$  east of Greenwich; after this it follows this meridian, crossing the Great Mussapa (defile of Chimanamani) till it reaches the point marked *A* on the map hereto annexed.

"2. As regards the second section of the frontier, which is comprised between the end of the preceding section and the point where the upper part of the eastern slope of the plateau cuts longitude  $32^{\circ} 30'$  east of Greenwich, the boundary follows the line shown on the map hereto annexed by the letters *A, B, C, D, E, F, G, H, I, J, L, M, N, O*, meeting the meridian  $32^{\circ} 30'$  at about latitude  $20^{\circ} 42' 17''$ .

"3. As to the third section, which concerns the territory which extends from the intersection of the edge of the eastern slope by  $32^{\circ} 30'$  in latitude about  $20^{\circ} 42' 17''$  to the point at which the Rivers Save and Lunde meet, the line, following the aforesaid meridian  $32^{\circ} 30'$ , runs in a straight line to the center of the main channel of the Save, and then ascends this channel to its confluence with the Lunde, where the frontier submitted to our arbitration comes to an end.

"A map, on which the line of delimitation in conformity with our decision has been drawn and which has been signed by us and bears our seal, is annexed to each of the originals of our award, of which it forms an integral part.

"Done at Florence, in duplicate, this 30th day of January 1897.

[L. S.]

"PAUL HONORÉ VIGLIANI.

"ALEXANDRE CORSI, *Secretary.*"

**Great Britain and the South African Republic.**—Award as to the southwestern boundary of the South African Republic:

"Whereas it is stipulated by Article II. of a convention between Her Majesty the Queen of the United Kingdom of Great Britain and Ireland and the South African Republic, signed in London on the 27th day of February 1884 by the representatives of the respective parties to the said convention, that 'Her Majesty's government and the South African Republic will each appoint a person to proceed together to beacon off the amended southwest boundary as described in Article I. of this convention,

and the President of the Orange Free State shall be requested to appoint a referee, to whom the said persons shall refer any questions on which they may disagree respecting the interpretation of the said article,' and that 'the decision of such referee shall be final;'

"And whereas Her Majesty's government did appoint Captain Claude Reignier Conder, R. E., and the government of the South African Republic did appoint Tielman Nieuwoudt de Villiers, esq., as such persons to proceed together to beacon off the said amended southwest boundary;

"And whereas thereafter the President of the Orange Free State, being thereunto requested, did, on the 5th day of June 1885, appoint Meluis de Villiers, one of the judges of the high court of justice of the Orange Free State, to be such referee as aforesaid;

"And whereas the before-mentioned Captain Claude Reignier Conder, R. E., and Tielman Nieuwoudt de Villiers, esq., did refer to the said referee the following question on which they disagree respecting the interpretation of Article I. of the said convention, namely, What extent of ground to the west of the roads from Lotlakana to Kunana and from Kunana to Taungas, as such roads have been accepted and agreed upon by the commissioners of the governments of Her Majesty and of the South African Republic respectively, was intended to be included in the South African Republic by the words 'skirting Kunana so as to include it and all its garden ground but no more in the Transvaal:'

"Now therefore I, the said referee, do hereby decide and declare that the said words denote the ground included between the said roads and the following boundaries, namely: A straight line from a point on the road from Lotlakana to Kunana, as accepted and agreed upon by the respective commissioners before mentioned, 1 mile southwest of the point where the road crosses the 'spruit' known as 'Tlakayeng,' to a point on the 'kopje' immediately behind Batubatu's kraal, where the line next to be mentioned reaches the summit of the 'kopje;' thence a straight line to a point 200 yards northwest of an isolated hut whereof compass observations were taken by the British commissioners in the presence of the referee and of the commissioner of the South African Republic, this straight line passing immediately behind the huts of Batubatu's kraal so as to exclude them from the South African Republic; next a straight line from the said point 200 yards from the said hut to the northwestern corner of Ramatlane's garden, of which similar observations were taken; thence a straight line skirting the western side of the garden to its southwestern corner, that point being very nearly magnetic north of the 'kopje,' being the northernmost of three 'kopjes' forming the termination of a range of hills which is crossed by the road from Kunana to Marebogo, about 6 miles from the former place; next a straight line from the said southwestern corner of Ramatlane's garden to the summit of the said 'kopje;' thence a line along the ridge of the said range of hills to the point where the hill is crossed by the road last mentioned.

"Dated at Kunana this 5th day of August 1885.

"MELUIS DE VILLIERS."

Great Britain and Spain.—October 16, 1864, the British schooner *Mermaid*, laden with coal, while passing the Spanish forts of Ceuta, was

fired into and sunk. The cause of the firing was her failure to exhibit her colors, as required by the Spanish ordinances, while she was passing through the territorial waters. The master of the schooner alleged that she exhibited her colors immediately after the first shot, which was a blank, was fired. The Spanish authorities alleged that her colors were not hoisted till after the third shot. Meanwhile the two governments entered into negotiations for the abolition of the practice of firing on merchant vessels from British and Spanish forts on the Straits of Gibraltar on account of the failure of such vessels to exhibit their colors, and a declaration for that purpose was signed March 2, 1865.<sup>1</sup> March 4, 1868, an agreement was concluded for the reference of the claim of compensation for the sinking of the *Mermaid* to a board of four persons, two to be appointed by each government from its diplomatic and naval services. The commissioners so appointed were to meet at Cadiz or Ceuta, and, if they should be unable to agree, to choose by lot an umpire. They were empowered to determine the validity as well as the amount of the claim.<sup>2</sup>

**Great Britain and Spain.**—A difference growing out of a collision between the Spanish man-of-war *Don Jorge Juan* and the British merchant vessel *Mary Mark* was referred to the British consul at Madrid and a lieutenant in the Spanish navy as arbitrators. The Italian minister at Madrid accepted the post of umpire, but his services were not required, since the arbitrators, in December, 1887, arrived at an agreement and made an award. This award has not been published.

**Great Britain and Venezuela.**—By a convention signed September 21, 1868, these powers, "with the view of determining the amount of all pending British claims upon the Government of Venezuela," established a tribunal, with an umpire, "to sit as a mixed commission to fix the amount due to those British subjects whose claims have not yet been adjudicated upon." This commission sat in 1869 and made awards on a number of claims.<sup>3</sup>

**Great Britain and Venezuela.**—A treaty between these powers for the settlement by arbitration of the boundary between British Guiana and Venezuela was signed at Washington, February 2, 1897. The arbitral tribunal is to consist of five jurists, four of whom are named in the treaty as follows: Baron Herschell and Sir Richard Henn Collins, a justice of the British supreme court of judicature, both nominated by the members of the judicial committee of Her Britannic Majesty's privy council; Chief Justice Fuller, of the Supreme Court of the United States, nominated by the President of Venezuela, and Mr. Justice Brewer, of the same court, nominated by the justices thereof. The fifth jurist is to be selected by the four thus nominated, or, if they should be unable to agree, by the King of Sweden and Norway. It is announced that M. de Martens, of St. Petersburg, has been selected as fifth jurist, who is also to be president of the tribunal.

The tribunal of arbitration is charged to "investigate and ascertain the extent of the territories belonging to, or that might lawfully be claimed by, the United Netherlands or by the Kingdom of Spain respectively at

<sup>1</sup> Br. and For. State Papers, LV. 40; LVIII. 1258.

<sup>2</sup> Br. and For. State Papers, LVIII. 2.

<sup>3</sup> United States and Venezuelan Commission, convention of December 5, 1885, Opinions, 311; Br. and For. State Papers, LIX. 168; LXIII. 1065.

the time of the acquisition by Great Britain of the colony of British Guiana," and to "determine the boundary line between the colony of British Guiana and the United States of Venezuela." In performing this duty, the arbitrators are to be governed by certain rules and by pertinent principles of international law not inconsistent therewith. The rules are as follows:

"(a) Adverse holding or prescription during a period of fifty years shall make a good title. The arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription.

"(b) The arbitrators may recognize and give effect to rights and claims resting on any other ground whatever valid according to international law, and on any principles of international law which the arbitrators may deem to be applicable to the case, and which are not in contravention of the foregoing rule.

"(c) In determining the boundary line, if territory of one party be found by the tribunal to have been at the date of this treaty in the occupation of the subjects or citizens of the other party, such effect shall be given to such occupation as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the tribunal, require."

Within eight months from the exchange of the ratifications of the treaty, which took place on the 14th of June 1897, each party is required to deliver in duplicate to each of the arbitrators and to the agent of the other party a printed case, accompanied by the evidence; and within four months after the delivery of the case on both sides, each party may in like manner deliver a counter case and additional evidence in reply to the case and evidence presented by the other party. It is made the duty of the agent of each party, within three months after the expiration of the time limited for the delivery of the counter cases, in like manner to submit a printed argument, which may afterward be supported by oral argument of counsel. Further argument, either written or oral, may be required by the arbitrators. It is also provided that the arbitrators may enlarge by not more than thirty days the time allowed for filing the cases, counter cases, and original arguments. The decision of the tribunal, which is to be in writing and "signed by the arbitrators who may assent to it," must, "if possible, be made within three months from the close of the argument on both sides."

**Hayti and San Domingo.**—In a letter to the writer of May 4, 1896, Mr. Henry M. Smyth, then minister of the United States at Port-au-Prince, mentions, among the arbitrations to which Hayti has been a party, the "long standing 'boundary dispute' between Haiti and San Domingo, now referred to His Holiness Leo XIII. for arbitration."

**Italy and Brazil.**—By a protocol of February 12, 1896, the President of the United States was named as arbitrator to determine the claims of Italian subjects against the Government of Brazil. The protocol, however, required the sanction of the Brazilian Congress and the approval of the Italian Government, and at the time of the writer's latest advices the matter had not been disposed of. By another protocol of the same day (February 12, 1896), it was agreed that the claims of Italian subjects against Brazil for requisitions of animals, merchandise, and valuables, in

the States of Rio Grande do Sul and Santa Catarina should be referred to a mixed commission.

**Italy and Persia.**—June 5, 1890, the governments of Italy and Persia entered into the following agreement:

"The government of His Imperial Majesty the Shah of Persia and the Government of His Majesty the King of Italy, being equally animated with the desire to settle in a friendly manner the difference which arose at Recht in November 1882 between the administration of the imperial Persian customs and M. Joseph Consonno, an Italian subject, on account of the importation by the latter of ninety-two cases of merchandise, have decided to submit the question to the judgment of an arbitrator, who has been chosen in the person of His Ex. Sir W. White, ambassador of Her Majesty the Queen of Great Britain at Constantinople.

"For this purpose the two high contracting parties have agreed that:

"1. The documents, information, examinations, and proofs of every nature which the parties shall judge it their interest to present to the arbitrator shall be submitted to his excellency within the term of two months and a half from the date of the signature of the present protocol. After this period no production of documents or proofs shall be admitted;

"2. His Ex. Sir William White is requested to have the goodness to pronounce his opinion within the period of a month from the date of the production of the last documents by the parties;

"3. The arbitral opinion shall be without appeal and the parties pledge themselves to recognize it and execute it within the space of forty-five days from the date of its delivery.

"In faith whereof, His Highness Aminé-Sultan, Grand Vizier and Minister of the Court of His Imperial Majesty the Shah of Persia, and His Excellency Alexander, Count of Rege di Donato, Minister of His Majesty the King of Italy, at Teheran, have signed the present act, in quadruple original, in the French language, accompanied by a translation in the Persian language, and have affixed thereto the seal of their arms.

"Done at Teheran, the 5th day of the month of June, in the year one thousand eight hundred and ninety of the Christian era, the 16th of the month of Chawal of the year one thousand three hundred and seven of the Hegira.

"AMINÉ-SULTAN.

"A. DI DONATO."

June 12, 1891, the following award was rendered:

"The government of His Majesty the King of Italy and the government of His Majesty the Shah having agreed, in virtue of a protocol signed at Teheran the 5th of June 1890, to request the British ambassador at Constantinople, the very honorable Sir William White, to consent to be arbitrator in a litigation arising between M. G. Consonno, an Italian subject, of the one part, and the administration of the Persian customs on the other, and the British ambassador having accepted this mandate;

"The British ambassador, having subsequently asked the said governments to authorize him to associate with himself two assessors of his own choice, and the said governments having consented to that association, and the arbitrator having named for that purpose M. Emile de Borchgrave, min-

ister and envoy of Belgium to Constantinople, and M. Egmont de Winkler, counsellor of the German embassy in the same place, equally accepting;

"The said arbitrator and the assessors having received the assurance of the two above-mentioned governments that their decision would be without appeal, have considered it just, after hearing the advocates of both parties, and having sought every means of enlightening their conscience, to pronounce the following sentence:

"Whereas the Persian customs at Recht had the right to examine and stamp the merchandise contained in the ninety-two cases imported on the 28th of November 1882, by M. Consonno, and that the latter acted illegally in opposing that examination;

"Whereas the Persian Government had the right, on the refusal of M. Consonno to submit to the customs formalities at Recht, to confiscate the said goods;

"Whereas, however, the Persian Government, by not using its right immediately and by leaving the dispute unsettled for nearly eight years, caused a manifest injury to M. Consonno;

"Whereas, besides, if it is just, on the one hand, to abandon to the Persian Government the said goods contained in the ninety-two above-mentioned cases, it seems equitable, on the other hand, to pay the value of them to M. Consonno according to the valuation made by him at the custom-house;

"For these reasons the arbitrator and assessors decide and declare:

"That the Persian Government remains and shall remain in possession of the ninety-two above-mentioned cases which it seized;

"That the Persian Government shall pay to M. Consonno the sum of seventy-eight thousand francs, representing both the value of the goods, as it was declared by M. Consonno, and all the interest on this principal sum, of which M. Consonno was deprived during nearly eight years;

"That there is no ground to admit the reservations formulated during the pleadings, and since, by the advocate of the applicant, nor any others whatsoever;

"That each of the two governments shall pay the expenses occasioned by its own procedure, and divide in common the fees of the engrossing clerk and the translation of the documents required during the course of the arbitration;

"That the payments shall be effected within the space of forty-five days from the notification of the first sentence; that the sum adjudged to M. Consonno shall be paid to the embassy of His Majesty the King of Italy at Constantinople, and the above-mentioned expenses to whom due, also in Constantinople;

"This done and decided at Therapia the twelfth (12) of June one thousand eight hundred and ninety-one.

"WILLIAM WHITE,

"*The Arbitrator.*

"BORCHGRAVE,

"WINCKLER,

"*The Assessors.*"



**Italy and Portugal.—Award in the Case of Lavarello, 1893:<sup>1</sup>**

Sa Majesté le Roi de l'Italie et Sa Majesté Très Fidèle le Roi de Portugal étant convenus de soumettre à la décision arbitrale d'un jurisconsulte à nommer par le gouvernement des Pays-Bas, le différend existant entre les Hautes Parties, par suite des réclamations du sujet italien Michelangelo Lavarello contre le gouvernement du Portugal, Sa Majesté la Reine-Régente des Pays-Bas a daigné désigner le soussigné, Jean Heemskerk, docteur en droit et ès lettres, ministre d'état et membre du conseil d'état, comme arbitre.

Dès lors, messieurs les envoyés extraordinaires et ministres plénipotentiaires des Hautes Parties à la Haye, agissant d'après les instructions de leurs gouvernements respectifs, ont réglé l'objet de la décision arbitrale et les formes de la procédure par un acte de compromis, fait à la Haye le 1<sup>er</sup> septembre 1891, portant en substance que les Hautes Parties soumettent à la décision de l'arbitre les questions suivantes:

1<sup>o</sup> Les autorités sanitaires de Cap Vert ont-elles causé au sujet italien M. A. Lavarello les dommages et les préjudices pour lesquels il réclame?

2<sup>o</sup> Lui ayant causé ces dommages et ces préjudices, les autorités sanitaires de Cap Vert ont-elles procédé en conformité des lois et des règlements en vigueur à Cap Vert à l'époque où le vapeur *Adria* y a mouillé et y a été ancré, et sans manquer aux droits et aux obligations internationales établies par les traités existant entre l'Italie et le Portugal?

3<sup>o</sup> Ont-elles causé ces dommages et ces préjudices par leur procédé irrégulier, illégal et injustifiable?

Que l'arbitre, en cas de décision affirmative sur les première et troisième questions, fixera le montant de l'indemnité due à M. A. Lavarello;

Que les mémoires et les pièces justificatives des Hautes Parties seront remises à l'arbitre avant le 1<sup>er</sup> septembre 1892, et qu'après cette date il ne sera admis aucun document et aucune allégation, à moins d'être demandés par l'arbitre;

Que l'arbitre prononcera un arrêt motivé, sans appel, et en remettra une copie à chacune des deux légations; et que les honoraires de l'arbitre seront fixés par le gouvernement des Pays-Bas et payés par la partie dont le droit n'aura pas été reconnu.

Les mémoires et documents justificatifs ont été remis à l'arbitre en temps utile par les chefs des légations respectives à la Haye.

Conformément à l'acte de compromis, l'arbitre a demandé par sa lettre du 15 novembre 1892, à mr. le ministre plénipotentiaire d'Italie à la Haye la production d'un connaissement ou de connaissements de la cargaison de maïs dans 6:000 sacs à bord du vapeur *Adria*, que M. A. Lavarello a dit avoir voulu débarquer à Saint Vincent en octobre 1884; de cette demande de documents il a été immédiatement fait part à mr. le chargé d'affaires du Portugal à la Haye.

Par sa lettre du 10 janvier 1893 mr. le premier secrétaire faisant fonctions de chef de légation d'Italie à la Haye a fait savoir à l'arbitre que les documents demandés n'existent pas et lui a remis trois nouveaux documents, savoir une déclaration de témoin faite sous serment devant un des prêteurs à Gênes et deux lettres missives, à l'effet de suppléer à la preuve qui aurait résulté ou pu résulter du connaissement ou des connaissements faisant défaut.

<sup>1</sup> Documentos apresentados as Cortes na Sessão Legislativa de 1893, Secção III. Lisboa, Imprensa Nacional, 1893.

Mr. le chargé d'affaires du Portugal à la Haye, étant informé de l'existence de ces nouveaux documents, a déclaré verbalement et par sa lettre du 12 janvier 1893, ne pas juger utile d'en prendre connaissance, à moins de nouveaux ordres de son gouvernement.

Des mémoires et documents justificatifs des hautes parties, dûment examinés, il résulte ce qui suit.

*En fait :*

Feu M. A. Lavarello, négociant, ayant demeuré à Recco, province de Gênes, sujet italien, maintenant représenté par ses ayant cause, et dont le gouvernement d'Italie a fait sienne la réclamation contre celui de Portugal, a demandé réparation de dommages soufferts par lui :

(a) Parce que, étant parti le 19 août 1884 de Gênes, à bord du pyroscaphe postal italien *Adria*, lequel faisait le voyage à l'Amérique du sud avec escale aux îles de Cap Vert, ayant patente nette délivrée par le consul de Portugal à Gênes, et sans aucun cas de maladie à bord, il est arrivé le 28 du même mois à Saint Vincent de Cap Vert et que dans ce port les autorités sanitaires et civiles ont refusé à lui Lavarello et à d'autres voyageurs destinés au même port, ainsi qu'au navire entier, la libre pratique; que non seulement ces autorités ont imposé à l'*Adria* et aux voyageurs et marchandises que ce navire portait, la quarantaine de rigueur, mais qu'il fut refusé à lui Lavarello de purger sa quarantaine et de débarquer les 37 colis de marchandises qu'il avait apportées, soit à Saint Vincent même dans une embarcation qu'il aurait louée à cet effet, soit au lazaret existant à Porto Praia dans l'île de Santhiago. Par suite de ces mesures, par lui qualifiées d'illegales et arbitraires, il fut dans la nécessité de rester à bord de l'*Adria* avec les dites marchandises et de faire le voyage aux ports de la république de la Plata et retour à Saint Vincent de Cap Vert; et il dit avoir éprouvé de grandes pertes sur les marchandises; à ces causes il réclama pour dommages, consistant en ces pertes et en faux frais, la somme de lires 15,500.

(b) Que dans le même voyage du même pyroscaphe *Adria*, lui Lavarello ayant acheté, et embarqué, à Buenos Ayres et à Montevideo, 6:000 sacs de maïs pour la somme de lires 55,352.20, le fret pour Saint Vincent compris, il arriva de nouveau à ce port le 18 octobre (effectivement c'était le 16 octobre) 1884; que l'*Adria* y fut mise en quarantaine, quoique n'ayant aucun cas de maladie à board et venant d'un port indemne; que le même jour les dites autorités de Saint Vincent permirent que lui et les autres voyageurs à même destination louassent une barque (schooner) pour les transporter eux et leurs bagages et marchandises au lazaret de Porto Praia, à l'effet d'y purger la quarantaine; qu'en même temps la permission fut accordée au capitaine de l'*Adria*, M. Caffarena, de décharger les sacs de maïs, qui se trouvaient à bord, pour les importer à la douane de Saint Vincent après qu'ils eussent été exposés à l'air pendant vingt-quatre heures dans des gabares ouvertes; que lui Lavarello loua à cet effet deux gabares de Messieurs Cory Brothers à Saint Vincent; mais qu'après que 512 sacs de maïs eussent été transbordés, un contre-ordre fut donné et l'*Adria* se trouva forcé de continuer le voyage, de sorte que 5,488 sacs de maïs, restant à bord, durent être transportés à Gênes, où ils furent vendus au meilleur prix possible, savoir de lires 39,284, tous frais déduits, de sorte que lui Lavarello éprouva une perte, au lieu du gain espéré sur cette marchandise, laquelle, d'après lui, valait dans ce même temps à Cap Vert

environ lires 33 le sac, at aurai donc pu rapporter lires 198,000; il estima le dommage souffert à cette cause à lires 134,000.

(c) Que les 512 sacs de maïs débarqués par suite des ordres mentionnés ci-dessus, restèrent pendant quelques jours exposés à la pluie dans une ou deux gabares ouvertes, avant d'être emmagasinés en douane à Saint Vincent; qu'à cette cause le maïs fut avarié en partie et que lors de l'entrée en douane de cette marchandise, il manqua 38 sacs, probablement volés; que les 474 sacs restants durent être vendus à bas prix et ne rapportèrent que 393,000 réis, ou environ lires 2,000 (ce compte a depuis été rectifié par le plaignant et le rendement des 474 sacs de maïs reconnu avoir été 663,385 réis); le dommage qu'il a souffert de ce chef a été évalué par lui à lires 14,688.20.

En total la réparation de dommages demandée s'élève à lires 164,188.20.

A ces plaintes et réclamations le gouvernement de Portugal, dans son mémoire, accompagné de documents justificatifs, oppose (en substance) les moyens de défense suivants :

(ad a) Qu'il est vrai que le 28 août 1884 les autorités de Saint Vincent de Cap Vert ont refusé à l'*Adria*, venant de Gênes, la libre pratique et ont appliqué la quarantaine de rigueur aux voyageurs et aux marchandises se trouvant à bord de ce navire, même qu'elles ont refusé aux voyageurs destinés aux îles de Cap Vert de louer une embarcation à l'effet de se faire transporter avec leurs bagages au lazaret de Porto Praia, mais que les autorités portugaises à Saint Vincent, savoir le gouverneur des îles de Cap Vert et le délégué de la Junta de santé, n'ont pas défendu au capitaine de l'*Adria* de se rendre à Porto Praia; qu'ils lui ont seulement fait entendre qu'il ne pouvait pas compter qu'il y serait admis pour purger la quarantaine; que d'ailleurs les autorités de Saint Vincent ont agi en cette affaire en conformité aux lois existantes, tout au moins aux instructions données par le gouvernement, parce que le port et la ville de Gênes étaient infectés de choléra, ce qui n'était pas encore officiellement porté à la connaissance des autorités de Cap Vert, mais ce qu'elles avaient appris par lettres et télégrammes particuliers; mais que depuis lors ces nouvelles se sont trouvées confirmées par un bulletin de la santé maritime de Lisbonne, du 6 août 1884, inséré dans le *Diario do governo* n.º 177, et reçu à Saint Vincent le 12 septembre 1884, vu que cet organe officiel a déclaré le port de Gênes infecté de choléra depuis le 31 juillet 1884; que la patente nette, délivrée par le consul portugais à Gênes, ne donnait aucun droit au navire pour être admis en libre pratique, mais ne valait qu'à titre d'information pour les autorités de Saint Vincent; que d'ailleurs les pertes subies par Lavarello sur les 37 colis de marchandises n'étaient pas prouvées, mais que, s'il avait subi des dommages par le fait des mesures sanitaires, celles-ci avaient été appliquées à bon droit et seulement pour des motifs de salut public.

(ad b) Que le 16 octobre 1884, l'*Adria*, en revenant au port de Saint Vincent, après un voyage à Buenos Ayres et Montevideo, a été mis en quarantaine, quoique ces deux ports fussent indemnes et qu'il n'eût pas de malades à bord, à cause de sa provenance de Gênes, laquelle ville était alors officiellement déclarée infectée de choléra; que vu la longueur du voyage (58 jours en tout) et les patentes nettes délivrées dans l'Amérique du Sud, les mesures sanitaires furent moins rigoureuses qu'au mois d'août; qu'à cette cause Lavarello et les autres voyageurs destinés aux îles de Cap Vert purent se rendre avec leurs bagages et marchandises au lazaret de

Porto Praia dans une embarcation (le schooner *Maria*) par eux louée; que de même la permission fut donnée de débarquer une cargaison de maïs, seulement sous la condition d'être exposée à l'air dans des gabares ouvertes pendant un jour; que cette dernière clause était motivée par ce que le maïs pouvait s'être trouvé en contact avec les marchandises chargées à Gènes.

Que, quant au contre-ordre qui aurait empêché le déchargement de la plus grande partie des 6,000 sacs de maïs, le gouvernement de Portugal considère la réclamation de Lavarello comme mal fondée, parce qu'il n'a pas prouvé être propriétaire de cette quantité de maïs, ni que ce maïs avait été chargé à Buenos Ayres ou à Montevideo avec destination pour Saint Vincent, ni qu'un contre-ordre au déchargement ou un ordre pour précipiter le départ de l'*Adria* au 17 octobre 1884, aient été donnés; qu'au contraire le capitaine de ce navire a déchargé autant de maïs qu'il a voulu, savoir 512 sacs, dont un connaissement se trouve parmi les pièces justificatives de Lavarello, et qu'ensuite ce capitaine est parti librement du port de Saint Vincent après avoir pris des vivres et du charbon à bord.

(ad c) Que ni l'avaire, qui aurait été causée par la pluie pendant que les 512 sacs de maïs étaient exposés à l'air dans une ou deux gabares ouvertes, ni le prétendu vol de 38 sacs n'ont été prouvés; qu'au contraire il n'a pas plu à Saint Vincent pendant les 17<sup>e</sup> et 18<sup>e</sup> jours d'octobre et en petite quantité au 19<sup>e</sup> de ce mois, auquel jour on avait fini d'emmagasinier le maïs en douane; que 512 ou même 514 sacs de cette céréale ont été dédouanés en bon état, excepté quelque coulage d'un petit nombre de sacs; que les droits d'entrée ont été payés sur le nombre entier par Lavarello ou son mandataire; qu'ainsi il n'y a pas lieu d'admettre qu'il serait dû au plaignant une réparation de dommages éprouvés par lui à ce sujet.

*En droit :*

Considérant qu'il y a lieu de poser les trois questions mentionnées dans le compromis, séparément à l'égard de chacun des griefs mis en avant par le plaignant; et ainsi quant à la plainte *sub a* :

Considérant que les Hautes Parties sont d'accord sur les faits qui se sont passés en août 1884 à Saint Vincent, excepté en ce que le Gouvernement de Portugal ne reconnaît pas que les autorités de Saint Vincent aient empêché l'*Adria* de purger la quarantaine de rigueur, qui lui avait été imposée;

Considérant sur ce point, que le capitaine de l'*Adria* faisait escale à Saint Vincent à la seule fin de débarquer 15 passagers et leurs bagages et marchandises, parmi lesquels était M. A. Lavarello avec les 37 colis de marchandises, chargés par lui à cette destination; que d'après le journal de bord du 30 et 31 août 1884 (*pièce justificative*, n° 33) le pyroscaphe fut déclaré en quarantaine et on ne lui permit de débarquer ni voyageurs ni marchandises pour le lazaret, pas même de conduire ou faire conduire ces voyageurs à Porto Praia, dans l'île de Santhiago, ce qui avait été demandé expressément, mais ce qui fut refusé; que n'ayant pas moyen de faire autrement, l'*Adria* partit le 31 août après midi pour Montevideo, ayant auparavant chargé 177 tonnes de charbon;

Considérant que cette relation du journal de bord se trouve confirmée en tous points par une lettre du capitaine Caffarena datée du 30 août 1884 au consul d'Italie à Saint Vincent (*pièce* n° 34) et par la réponse, datée du même jour, de Mr. J. V. Miller, vice-consul d'Allemagne, faisant fonctions de consul d'Italie, dans laquelle il rend compte des démarches tentées en

vain auprès du gouverneur général des îles de Cap Vert et auprès du délégué du service sanitaire pour obtenir le débarquement en quarantaine à Porto Praia (pièce n° 35); qu'elle est encore confirmée par une requête envoyée le même jour par Henri Lubrano, passager à bord de l'*Adria*, venant de Gênes, à mr. le délégué de la junta de santé à Saint Vincent, à l'effet de n'être pas forcé de faire le voyage avec sa famille à l'Amerique du Sud, notamment au Brésil, où la fièvre jaune existait (pièce n° 37); et par une protestation signée par neuf sujets italiens, résidant à Saint Vincent, dont les signatures ont été légalisées par Mr. C. Martins, agent consulaire d'Italie à Saint Vincent, le 6 septembre 1884, se plaignant de ce que leurs compatriotes, les voyageurs à bord de l'*Adria*, s'étaient vu refuser la permission de débarquer avec leurs bagages et marchandises, quoique le navire eût une patente nette et que l'existence du choléra en Italie ne fût pas constatée, tandis que le même jour les mêmes autorités à Saint Vincent avaient donné la permission à plusieurs voyageurs, arrivés à bord du vapeur *Elbe* venant d'Angleterre, de débarquer avec leurs bagages dans une goîlette louée à cet effet pour les conduire à Porto Praia, et ce quoique les ports Angleterre fussent officiellement déclarés infectés de choléra (pièce n° 36); et enfin par une protestation datée du 30 août 1884, signée par Lavarello lui-même, Michel et Henri Lubrano et L. Germanetti, tous passagers à bord de l'*Adria*, adressée au consulat italien à Saint Vincent et légalisée comme ci-dessus, contenant plainte de ce qu'en dépit des lois et traités existants, on leur refusait de purger leur quarantaine et qu'ils allaient être forcés, à leur grand dommage pécuniaire, à faire un voyage à l'Amerique du Sud et à ramporter leurs marchandises (pièce n° 38);

Considérant que Lavarello a produit un connaissement daté à Gênes le 18 août 1884 et signé R. Piaggio & Fils, portant que lui Lavarello avait chargé sur l'*Adria* avec destination à Saint Vincent, 37 colis de marchandises, savoir: 2 caisses marbre ouvré, 1 caisse bouchons, 1 caisse biscuits, 6 colis chemises de coton, 1 beurre, 1 fût de vin, 4 colis sucre, 20 comestibles divers, et 1 cuisine en fer (pièces n° 18); qu'il a encore prouvé par les comptes acquittés de fournissens à Gênes et autres lieux et par une déclaration des propriétaires de l'*Adria* R. Piaggio & Fils (pièces n° 2 à 17 et 19), qu'il avait acheté et payé les dites marchandises pour des sommes, se montant à 15:072,81 livres, et payé pour son voyage de Gênes à Saint Vincent, 250 livres; pour fret, idem, 369,75 livres; pour passage et fret de Saint Vincent à Montevideo et retour, 1,000 livres; ensemble, 16:719,56 livres.

Considérant que les dites marchandises ont été déchargées le 16 ou 17 octobre 1884 dans le schooner portugais *Maria*, transportées à Porto Praia, et de retour à Saint Vincent, emmagasinées en douane le 27 et dédouanées le 28 du même mois avec déclaration de valeur totale de 207\$490 réis (équivalent à livres 1:151,62½) suivant la déclaration spécifiée du directeur de la douane J. H. D. Ferreira, datée à Saint Vincent le 22 février 1886 à son chef, le secrétaire général du gouvernement à Praia (*Mémoire pour le Gouvernement portugais*, documents, p. 112 à 115).

Considérant que le compte de vente de ces marchandises manque; mais que:

1° Le directeur de la douane, d'après la déclaration citée, s'est contenté d'une évaluation à une valeur vénale de beaucoup inférieure au prix coûtant et certifié que du moins 10 colis (de fruits) étaient gâtés; 2° que suivant les déclarations faites par cinq sujets italiens résident à Saint

Vincent, par devant l'agent consulaire d'Italie, à diverses dates en 1885, les comestibles apportés par Lavarello en août 1884, sont arrivés en mauvais état en octobre de la même année et que les autres marchandises ne pouvaient plus rapporter que 50 pour cent de moins qu'elles n'auraient pu valoir en août; notamment le négociant, C. B. Figari, a déclaré que quelques-unes de ces marchandises avaient été apportées de Gênes en commission pour lui Figari, et qu'en août il les aurait prises pour lres 10:000, mais que, deux mois plus tard, elles avaient 50 pour cent moins de valeur;

Considérant que de tout ce qui précède il résulte que les autorités de Saint Vincent ont causé des dommages et préjudices à M. A. Lavarello par leurs actes en août 1884, et qu'ainsi, la première question du compromis doit être résolue affirmativement;

Considérant quant à la deuxième et la troisième question du compromis: que les traités existant entre les Hautes Parties ne contiennent aucune stipulation spéciale à l'égard des mesures sanitaires en cas d'épidémie; que par conséquent les sujets et les navires d'une nation amie doivent se soumettre à la loi locale des ports et autres lieux, où ils se trouvent en pays ami, et qu'en revanche ils ont le droit d'être traités impartialement et à l'égal d'autres étrangers ou nationaux; que le traité de commerce entre l'Italie et le Portugal du 15 juillet 1872 garantit en général la liberté de commerce et de navigation aux sujets italiens sur le territoire portugais (article 1<sup>er</sup>) et bien que selon l'article 26<sup>e</sup> tous les autres articles du traité sont applicables seulement dans la métropole et les îles adjacentes, cependant ce même article garantit dans les colonies portugais aux navires italiens le traitement de la nation la plus favorisée; et conséquemment ce traité est incompatible avec des mesures qui entraveraient exceptionnellement ou arbitrairement la liberté de commerce de navires et voyageurs italiens dans ces colonies;

Considérant que le règlement du service de santé maritime du 12 novembre 1874, qui en 1884 était en vigueur aux îles de Cap Vert, prescrit dans l'article 94 que les navires provenant de ports non infectés avec patentes nettes, seront admis en libre pratique, mais que le § 2 du même article admet une exception pour le cas où l'inspecteur en chef apprendra officiellement ou d'autre source authentique, que (entre autres) dans les ports de départ il s'est manifesté des cas de choléra morbus dans l'un des cinq jours qui auront suivi le départ de la même embarcation; dans ce cas la quarantaine devra être appliquée conformément aux autres articles du règlement;

Considérant qu'au mois d'août 1884 la circonstance prévue par le § 2 s'est réalisée en effet à l'égard du port de Gênes; qu'ainsi les autorités civiles et sanitaires de Saint Vincent ont légalement refusé la libre pratique à l'*Adria* et aux voyageurs à bord de ce navire; mais qu'en leur refusant l'occasion et en les mettant par conséquent dans l'impossibilité de se soumettre à la quarantaine, même de se rendre au lazaret de Porto Praia, ces autorités de Saint Vincent ont outrepassé les bornes de leur pouvoir légal; qu'elles se sont notamment écartées des articles 87 et 99 du règlement cité ci-dessus; qu'il est vrai qu'un arrêté du 26 juillet 1884, émané du ministère de l'intérieur à Lisbonne, autorisa des mesures plus sévères pendant l'épidémie du choléra, qui sévissait alors, notamment la défense de débarquer des personnes ou de décharger des marchandises, appliquée aux navires, provenant des ports infectés, mais que cet arrêté, d'après sa te-

neur, ne concernait que le continent et les îles adjacentes; non les provinces d'outre-mer, nommément les îles de Cap Vert;

Considérant qu'il suit de ce qui précède, qu'on ne peut que répondre négativement à la deuxième et affirmativement à la troisième question du compromis;

Considérant que pour l'évaluation des dommages éprouvés par Lavarello par suite des mesures arbitraires prises à son égard par les autorités civiles et sanitaires de Saint Vincent, les frais de voyage et le fret qu'il aurait épargnés, si on lui avait permis de débarquer ou de se rendre au lazaret de Porto Praia en août 1884, sont de lres 1,000; qu'il y a lieu d'admettre qu'il n'obtint en octobre 1884, et plus tard qu'un prix peu supérieur à la somme de lres 1:125,62½ à laquelle les marchandises furent évaluées lors du dédouanement à la fin d'octobre; que cependant l'italien Figari, demeurant à Saint Vincent, dont Lavarello a invoqué le témoignage, a déclaré plus tard être prêt à payer encore lres 5:000 telles de ces marchandises, dont il aurait donné auparavant lres 10,000; qu'ainsi à défaut de données plus précises sur les pertes subies et la chance de gain manquée sur ces marchandises, il y a lieu d'évaluer les dommages, dont réparation est due à Lavarello, à lres 11,000.

Quant à la plainte *sub b*.

Considérant qu'il est avéré que l'*Adria*, étant revenue des ports du Rio de la Plata le 16 octobre 1884, au port de Saint Vincent, a été soumis à la quarantaine sans autre motif donné que sa provenance de Gênes; que cette mesure paraît très rigoureuse après un voyage de cinquante-huit jours sans cas de maladie contagieuse à bord, mais que cette rigueur ne dépasse pas les termes du règlement, cité plus haut, notamment des articles 99 et 114; que d'ailleurs Lavarello et les autres voyageurs italiens à bord de l'*Adria* se sont soumis aux mesures quarantaines en louant le schooner *Maria* pour se faire transporter avec leurs bagages Porto Praia et deux gabares, afin de recevoir du maïs qui serait déchargé de l'*Adria* pour entrer ensuite en douane, et que nulle réclamation n'a été faite à cause de la mise en quarantaine;

Considérant que le sujet de la plainte portée est, que la permission donnée par les autorités du port de Saint Vincent pour décharger du maïs, appartenant à Lavarello, aurait été retirée arbitrairement par les mêmes autorités qui l'avaient donnée et que le navire aurait été forcé de partir; que ces faits sont contestés formellement par le gouvernement de Portugal;

Considérant que Lavarello a produit la preuve directe qu'il était chargeur et propriétaire de 512 sacs de maïs, qui ont été déchargés du 16 au 17 octobre 1884, savoir le connaissement (*pièce n° 44*) daté de Buenos Ayres le 25 septembre 1884, signé par le capitaine de l'*Adria* (M. Caffarena) contenant le nom du chargeur E. Piaggio, celui du consignataire M. A. Lavarello, et en outre un endossement à F. Dias de Carvalho Braga en date du 30 octobre 1884, signé par M. A. Lavarello lui-même, et deux remarques signées par le greffier de la douane à Saint Vincent, V. F. F. Vidal; que ce document fait preuve pleine et entière pour Lavarello de la propriété du maïs lors de l'arrivée de l'*Adria* à Saint Vincent, selon les articles 558 et 559 du code de commerce italien;

Considérant que pareille pièce n'a pas été produite pour prouver que Lavarello était chargeur et propriétaire de 6,000 sacs de maïs destinés pour

Saint Vincent et que selon les documents produits en janvier 1893, par le gouvernement d'Italie, de pareilles pièces n'existent pas et n'ont pas existé à l'égard des sacs de maïs non déchargés à Saint Vincent; que, probablement pour suppléer au manque de ces connaissements, M. A. Lavarello a produit deux comptes (pièces nos 26 et 32) émanant tous deux de la maison de commerce Rocco Piaggio & Fils, de Gênes, le premier daté de Gênes le 4 novembre 1884, et portant facture pour l'achat de 1,270 sacs de maïs embarqués à Buenos Ayres, et 4,684 sacs de maïs embarqués à Montevideo, ensemble 5,954 sacs, avec destination à Saint Vincent de Cap Vert pour le compte de Lavarello, au prix de lres 45,349.10 et pour fret, assurance et commission lres 10,623.10, ensemble lres 55,972.20 payables le 15 janvier 1885, à Gênes; le second daté de la même ville le 15 décembre 1884, et portant compte de vente de 5,454 sacs de maïs ex *Adria* au prix de lres 41,721.25, dont à déduire pour débarquement (de 4,000 quintaux), timbres, frais de douane, pesage (à 3,830 quintaux), courtage, commission et del credere lres 2,729.70; à ajouter pour intérêt d'un mois lres 292.45, faisant un produit net au 15 janvier 1885 de lres 39,284, de sorte que M. A. Lavarello y est débité pour le solde de lres 16,688.20 à la même date; que la sincérité du résultat ou solde de ce dernier compte a été affirmée sous serment par mr. Erasme Piaggio, chef de la maison Rocco Piaggio & Fils (en liquidation) devant un des prêteurs à Gênes, le 31 décembre 1892; que ces pièces quoique ne faisant pleine preuve qu'entre les parties elles mêmes (Lavarello et Rocco Piaggio & Fils), offrent cependant une forte présomption pour affirmer que Lavarello avait à bord de l'*Adria* 5,954 sacs de maïs à sa disposition;

Considérant que les documents cités laissent pourtant quelques doutes quant à la destination de ces sacs de maïs savoir: 1° D'après la pièce n° 26, le fret du chargement est porté au débet de Lavarello depuis les deux ports de la Plata à Saint Vincent, mais d'après la pièce n° 32 aucun fret n'est porté à sa charge pour le voyage de Saint Vincent à Gênes; 2° Parmi les documents justificatifs du *Mémoire pour le gouvernement portugais*, page 112, on trouve la traduction d'un certificat de la douane de Gênes, portant spécification des chargements de maïs, débarqués ex *Adria* en novembre 1884, entrés en douane et dédouanés à Gênes; on y trouve (outre 2,009 sacs de maïs pour un autre chargeur), 1,258 ou 1,259 sacs de maïs chargés à Buenos Ayres, destinés pour Gênes, dont était chargeur E. Piaggio à ordre et 4,684 sacs de maïs chargés pareillement à Buenos Ayres, destinés pour Gênes, dont était chargeur E. Piaggio à lui-même; ces deux parties de maïs ont été dédouanées, étant vendues à l'étranger; admettant que la différence de 1,258 ou 1,259 sacs, pour la première partie, à 1,270 sacs soit une quantité négligeable, et que la provenance de Buenos Ayres ait été notée par erreur (au lieu de Montevideo) pour la deuxième partie, on peut admettre l'identité de ces deux parties de maïs consignées à Gênes, ensemble 5,942 ou 5,943 sacs, avec les 5,954 sacs dont l'achat est porté en compte à Lavarello par la pièce n° 26; alors Lavarello était le seul ayant droit sur ce chargement de maïs et ont doit conclure en même temps, que les 512 sacs de maïs déchargés du bord de l'*Adria* sur des gabares n'ont pas été déduits de ce chargement, mais se trouvaient en outre dans la possession de Lavarello; de là on devra tirer la conséquence: 3° Que Lavarello en faisant sa première réclamation le 25 octobre 1885, quelques mois après



avoir apuré son compte avec Rocco Piaggio & Fils, se soit trompé étrangement à son propre désavantage, en soutenant qu'il avait (en octobre 1884) une quantité de 6,000 sacs de maïs à bord, et qu'il avait manqué d'en vendre à Saint Vincent 5,488; tandis qu'en réalité il aurait eu 5,954 plus 512, soit 6,466 sacs de maïs, et en aurait ramporté 5,954 de Saint Vincent; et 4<sup>e</sup> il reste inexplicable pourquoi Rocco Piaggio & Fils, ayant reçu et vendu dans la douane de Gènes 5,954 (soit 5,942 ou 5,943) sacs de maïs, ne tenaient compte à Lavarello que de 5,454 sacs dans la pièce n° 32;

Considérant que, en admettant que Lavarello (en dehors des 512 sacs dont on a le connaissance) pourrait disposer le 16 et 17 octobre 1884, d'une grande partie de maïs, se trouvant à bord de l'*Adria*, il est nécessaire de rechercher, s'il a voulu la décharger le 16 ou 17 octobre 1884, s'il a tenté de le faire et s'il en été empêché par les autorités de Saint Vincent?

Considérant qu'à l'égard du fait allégué par Lavarello, que les autorités de Saint Vincent auraient empêché le déchargement de la plus grande quantité du maïs à bord de l'*Adria*, les Hautes Parties ont eu recours à l'épreuve testimoniale et ont produit plusieurs témoignages, qui se contredisent entre eux; mais en comparant et jugeant ces témoignages, il faut observer que les témoins n'ont jamais été entendus ensemble ni contradictoirement, ni même en vertu d'une commission rogatoire judiciaire, mais séparément par divers magistrats, dont chacun, ne connaissant pas l'affaire, n'était éclairé que par une des parties intéressées sur ce qu'il avait à demander au témoin; de sorte que, même quand la contradiction la plus apparente se produit entre deux ou plus de ces témoignages, il ne s'ensuit pas, que l'un des témoins ait dit toute la vérité, ni qu'un autre ait juré un faux serment;

Considérant que M. Caffarena, en 1884 capitaine, et trois autres témoins, alors officiers de l'*Adria*, ont déclaré le 20 août 1886 devant un des préteurs de Gènes, entre autres, que le capitaine du port de Saint Vincent et le médecin du service sanitaire, étant à bord de l'*Adria* le 16 octobre 1884, après s'être informés si M. A. Lavarello était à bord, ont décidé que ce navire serait mis en quarantaine; que plus tard il lui fut permis de débarquer des voyageurs et du maïs, mais que, après que Lavarello et la famille Lubrano (de Livourne) et 512 sacs eussent été débarqués on donna l'ordre (si intimé) au navire de partir le jour même et que l'*Adria* dut subir la violence qu'on lui faisait et ramporter à Gènes les 5:488 sacs de maïs restants (pièces n°s 42 et 43); en faisant cette dernière déclaration ces témoins n'avaient évidemment pas présente à l'esprit la déclaration faite par Caffarena à la douane de Gènes en novembre 1884, suivant laquelle environ 8,000 sacs de maïs se trouvaient à bord de l'*Adria* lors de son départ; de sorte que le chiffre était inexact et ne pouvait être resté en leur mémoire que par ce qu'ils connaissaient depuis quelque temps la réclamation de Lavarello; d'ailleurs aucun d'eux ne précise, qui ait donné l'ordre de repartir sans délai, ni si cet ordre fût verbal ou par écrit.

Considérant que trois témoins du nom de Morino, tous trois marins à bord de l'*Adria* en 1884, ont déclaré devant le préteur de Recco, le 19 septembre 1886, entre autres, que l'autorité sanitaire de Saint Vincent, après avoir permis, le 16 octobre 1884, le débarquement des passagers, destinés aux îles de Cap Vert et du maïs fit cesser cette opération à peine commencée et ordonna au navire de partir après que les voyageurs avaient

été débarquer pour se rendre à Porto Praia; de sorte qu'une grande quantité de maïs appartenant à Lavarello fût transportée à Gênes (pièce n° 40);

Considérant que Michel Lubrano, en 1884 voyageur à bord l'*Adria* avec destination pour Saint Vincent, a déclaré le 7 septembre 1886 devant un des préteurs de Livourne, entre autres, que le débarquement des passagers, pour se rendre à Porto Praia, et du maïs ayant été permis par l'autorité sanitaire, et après que lui déposant et sa famille et Lavarello eurent quitté l'*Adria* et se trouvaient à bord d'une allège avec les marchandises, la même autorité fit défense au capitaine Caffarena de continuer le déchargement du maïs et qu'on donna au dit capitaine l'ordre de partir, contre lequel ce capitaine protesta (pièce n° 41); il est à remarquer que le témoin Lubrano, n'étant plus à bord de l'*Adria*, n'a pu connaître que plus tard par oui-dire ce dernier fait et que Caffarena n'en a rien déclaré;

Considérant que mr. A. Annovazzi et trois dames Ravagli (artistes), ayant voyagé à bord de l'*Adria* de Buenos Ayres à Gênes, ont déclaré le 17 septembre 1886 devant un des préteurs de Milan qu'en vertu de la quarantaine imposée le 16 octobre 1884, il ne leur fut pas permis de quitter le navire à Saint Vincent, mais que Lavarello et la famille Lubrano ont débarqué avec une partie des marchandises dans une allège et qu'on ne les a pas revus à bord; que plus tard l'ordre a été donné de cesser le débarquement et de partir du port (pièce n° 30);

Considérant qu'à ces témoignages le gouvernement de Portugal en a opposé d'autres, reçus sous serment en 1887 par une commission d'enquête administrative au sujet de toutes les plaintes de Lavarello, désignée par arrêté du gouverneur général de Cap Vert du 10 février 1886; entre autres ceux de cinq employés de la douane et de la santé maritime un timonnier et deux rameurs du même service, qui ont tous accompagné le 16 et le 17 octobre 1884 le dr. A. M. da Costa Lerenó, délégué du service sanitaire, lors de ses visites à bord de l'*Adria*, déclarant: qu'ils n'ont entendu aucun ordre de cesser le déchargement du maïs, et que l'*Adria* est parti quand le capitaine l'a voulu, après avoir pris des vivres et du charbon; un garde de la douane qui a été chargé de la surveillance du vapeur *Adria* pendant toute la durée du séjour de ce navire à Saint Vincent le 16 et 17 octobre 1884 et de l'exécution des ordres touchant la quarantaine, donnés par le dr. Lerenó, lequel garde (Amado) a déclaré, que nul ordre de cesser le déchargement du maïs n'a été donné, si ce n'est qu'après le soleil couché ce travail a dû être cessé jusqu'au lendemain matin, comme c'est la règle dans le port de Saint Vincent; que l'*Adria* n'a pas été forcé de partir, mais est parti quand cela lui a plu, après avoir pris des vivres et du charbon. (*Mémoire pour le gouvernement portugais*, pag. 90 à 96);

Considérant que devant la même commission d'enquête administrative sont comparus et entendus sous serment en juillet 1887 deux sujets italiens domiciliés à Saint Vincent, dont le premier E. Galleano, a dit être négociant et associé avec M. A. Lavarello, et qu'il a été à bord de l'*Adria* le 17 octobre 1884, quand ce navire était en quarantaine; qu'alors Lavarello lui ayant dit qu'il avait une partie de maïs à vendre, lui confia deux échantillons de cette marchandise pour savoir le prix qu'il en pourrait obtenir; qu le témoin est retourné à bord et a dit à Lavarello que les négociants de l'île n'en voulaient donner qu'un très bas prix vu que c'était du maïs étranger et que le maïs indigène ne manquait pas; qu'ensuite Lavarello, après en voir conféré avec Caffarena, lui a dit qu'ils ne vendraient pas ce

mais et que tout irait en Italie; que cependant le même jour environ 500 sacs de maïs ont été transbordés dans des gabares louées de Cory Brothers; que Lavarello a débarqué tout ce qu'il a voulu et l'a consigné à F. Dias de Carvalho Braga, qui a vendu le maïs à bas prix; le second, G. Cavassa, négociant a dit que, se trouvant en octobre 1884 dans une embarcation aux flancs de l'*Adria*, il a appris que Lavarello avait à bord une partie de maïs à vendre; qu'en effet environ 500 sacs de maïs ont été déchargés dans des gabares de Cory Brothers; qu'il n'a jamais entendu dire que la permission ait été refusée d'en débarquer davantage (*Mémoire du gouvernement portugais*, p. 109, 110);

Considérant enfin, que le journal de bord de l'*Adria* mentionnant ce qui s'est passé le 16 et 17 octobre 1884 au port de Saint Vincent, n'a pas été produit, et qu'il n'existe aucune demand ou requête ni aucune protestation par écrit, adressée soit aux autorités de l'île, soit au consulat d'Italie à Saint Vincent, ni de la part de Caffarena ni de celle de Lavarello, ayant rapport à l'empêchement allégué du déchargement de maïs ou au prétendu départ forcé de l'*Adria* en octobre 1884, comme les passagers et le capitaine n'avaient pas manqué de faire en août 1884, et cela quoique Lavarello soit resté encore plusieurs semaines aux îles de Cap Vert après le 17 octobre;

Considérant que comme conséquence de tout ce qui précède il n'est pas possible d'admettre comme certain et bien prouvé le fait dont Lavarello s'est plaint *sub b*, et que la première question posée dans le compromis doit être résolue négativement;

Quant à la plainte *sub c.* :

Considérant qu'il est avéré entre les deux Hautes Parties que 512 sacs de maïs, provenant de Buenos Ayres, appartenant à Lavarello, ont été débarqués de l'*Adria* le 17 octobre 1884 dans deux gabares appartenant à Cory Brothers pour être exposés à l'air pendant vingt-quatre heures et être emmagasinés ensuite le 16 octobre à Saint Vincent;

Considérant que suivant le compte acquitté de Cory Brothers en date de Saint Vincent le 17 décembre 1884, Lavarello a eu l'usage de ces gabares pendant trois jours du 16 au 19 octobre; que d'après les informations du gouvernement portugais (*Mémoire*, p. 41 et 106) on ne peut affirmer que réellement la marchandise soit entrée en douane le 18, comme cela aurait dû se faire et comme le registre de la douane le porte; qu'il est possible que l'entrée en magasin se soit faite un ou deux jours plus tard; que de son côté Lavarello a produit un télégramme signé Cory et reçu par lui le 20 octobre à Porto Praia, où il se trouvait alors pour purger la quarantaine imposée, dans lequel on lui mande que le maïs se trouvait encore en quarantaine et qu'une partie des sacs était avariée par la pluie (*pièce n° 45*); que suivant les observations météorologiques fournies par le gouvernement de Portugal, il n'a pas plu à Saint Vincent le 17 et le 18, mais bien le 19 et beaucoup le 20 octobre, ce qui confirme en partie la teneur du télégramme; que, en vérité, l'authenticité du télégramme a été mise en doute, mais seulement : 1<sup>o</sup>, parce que Messieurs Cory Brothers n'en ont pas tenu copie; 2<sup>o</sup> parce que la *Brazilian submarine telegraph company* n'a commencé son service à Praia que le 20 novembre 1884; objection futile, puisque le télégramme porte en tête le nom d'une compagnie d'entrepreneurs, qui évidemment avait posé le câble sous-marin, livré depuis à la *Brazilian* savoir la *India rubber, gutta-percha and telegraph wire works company*;

Considérant que sur le connaissance des 512 sacs de maïs se trouve écrit en portugais (au recto): "Sont entrés dans cette douane quatre cents soixante-quatorze (474) sacs de maïs; plusieurs de ces sacs, étant mouillés et avariés en grande partie." (Signé) V. F. F. Vidal. "Ce sont quatre cents soixante-quatorze (474). (Signé) V. F. F. Vidal." (A la première ligne on avait d'abord écrit quatre centos noventa e sete (497), puis en surchargeant les mots: noventa e sete et les chiffres 97, on a écrit dessus: setenta e quatro et les chiffres 74; ensuite pour ne pas laisser de doute, on a de nouveau ajouté les vrais nombres et signé de nouveau). Au verso du connaissance sur la page imprimée se trouve écrit, de la même main (en portugais): "Déclaration. Les sacs de maïs sont entrés dans la douane en mauvais état, une grande partie de ces sacs ayant beaucoup de manque causé par rupture, et d'autres se trouvant avec le maïs mouillé et en commencement de putréfaction. Douane de Saint Vincent le 10 janvier 1885 (signé) V. F. F. Vidal" (pièce n° 44); que V. Ferreira da Fonseca Vidal, secrétaire du déchargement de la douane à Saint Vincent, étant interrogé sous la foi du serment, le 25 juin 1887, par l'administrateur de district de Praia, Ile Santhiago, à d'abord déclaré n'avoir pas le moindre souvenir d'avoir écrit de semblables notes et qu'elles seraient contraires à la vérité, mais en étant interrogé plus précisément, a répondu qu'il pourrait bien avoir écrit le nombre de 474 sacs, parce que les sacs avaient d'abord été comptés ainsi; mais ensuite on en avait trouvé 514; qu'il en était de même de la seconde déclaration; qu'il y avait bien du coulage et que 12 ou 15 sacs n'étaient peut-être pas pleins et 6 sacs seulement remplis à moitié; que s'il y avait eu du maïs gâté ou avarié, il aurait dû en référer à l'administration; que s'il avait cependant déclaré telle chose, ce n'avait été qu'une déclaration gracieuse;

Considérant que la déclaration de ce témoin ne peut faire d'autre impression morale que de son embarras d'avoir attesté des faits vrais, mais désagréables à ses chefs immédiats;

Considérant que la vérité des déclarations écrites par Vidal sur le connaissance, est confirmée par le compte de vente de F. Dias de Carvalho Braga, négociant, demeurant à Mindello, agent en douane, et ayant agi dans cette affaire comme fondé de pouvoir pour Lavarello, qui lui avait endossé le connaissance; dans ce compte daté de Saint Vincent le 18 février 1885 (pièce n° 31) Braga porte à son débet 474 sacs de maïs, dont 2 qu'il avait remis à Lavarello personnellement; les 472 restants ont mesuré 3.790 quartas (c'est-à-dire 947.5 alqueires, lesquels, suivant une déclaration sous serment de Braga du 6 juillet 1887, pesaient environ 300 quintaux ou si l'on évalue l'alqueire au poids de  $\frac{1}{4}$  quintal, 315.8 quintaux) de maïs qui (avec 111 sacs vides, valant 100 réis chaque sac) ont obtenu un prix de 834\$860 réis, dont à déduire 10 pour cent de commission 83\$485 réis, droits d'entrée de 10 pour cent de la valeur calculée à 1\$000 réis le sac de maïs 47,400 réis; droits d'octroi de 3 pour cent de la même valeur, 14\$240 réis (au juste 14\$220 réis) et timbre de 700 réis; différence de monnaies, frais de transports dans les magasins et pour l'enchère et quatre mois de loyer de magasins, ensemble 25\$700 réis; en tout 171\$525 réis; solde en faveur de Lavarello 663\$335 réis; lequel compte a été apuré et Lavarello lui a donné quittance et décharge du solde (*Mémoire du gouvernement portugais*, p. 100);

Considérant que l'on peut et doit induire de ces chiffres, que Lavarello a

éprouvé des dommages sur le maïs en question depuis que cette marchandise avait été reçue ou avait dû être reçue en douane :

Sur la *quantité* : les 5,954 sacs de maïs embarqués aux ports de la Plata pesaient 1,012,280 livres ou 465,602.80 kilogrammes, c'est-à-dire chaque sac en moyenne 78.2 kilogrammes ; de la même cargaison 5,454 sacs débarqués à Gênes pesèrent 380,387.5 kilogrammes, c'est-à-dire chaque sac en moyenne 69.8 kilogrammes ; donc il y eut pendant le voyage de la Plata à Gênes un déchet d'environ, 8.5 kilogrammes par moyenne de sac ; à Saint Vincent, si l'on admet le chiffre de 315.8 quintaux (de 100 kilogrammes) comme le poids équivalent à la mesure de 3,790 quartas ou 947.5 alqueires, on arrive à 63.5 kilogrammes par moyenne de sac ce qui correspond assez bien au compte de Braga donnant 8.03 quartas de mesure par sac ; ainsi on trouve un extra déchet ou conlage de 6.3 kilogrammes par sac ou 2,973.6 kilogrammes sur les 472 sacs, et ensuite le poids probable de 38 sacs manquants, donnant, à 63.5 kilogrammes la moyenne de sac, une quantité de 2,413 kilogrammes, ensemble 5,346.6 kilogrammes de manque ;

*Quant au prix* : Il résulte du compte de Braga que les 472 sacs n'ont rendu netto que 663\$335 réis, soit par sac 1\$405 réis, par quarta 175 réis, par alqueire 700 réis ; or le prix du maïs étranger a été, suivant les mercuriales officielles d'octobre 1884 à janvier 1885, à Saint Vincent de 960 à 800 réis l'alqueire (Mémoire du gouvernement portugais, p. 98, 99 ; à la page 36 du même mémoire ce prix courant est calculé par quintal, ce qui donnerait des prix ridicules) ; il y a donc eu perte sur la valeur des sacs de maïs vendus en douane, de 15 à 25 pour cent, ou en moyenne de 20 pour cent ;

Considérant que par conséquent la première question du compromis doit être résolue affirmativement ;

Considérant que d'après le rapport du délégué dr. da Costa Lereño, daté du 17 octobre 1884, c'est-à-dire du jour même du second départ de l'*Adria* (*Mémoire pour le gouvernement portugais*, p. 66), il y eut doute et dissentiment parmi les docteurs à Saint Vincent, sur la question, si la quarantaine pouvait et devait être appliquée au pyroscaphe *Adria* et aux voyageurs et leurs bagages ; que l'affirmative ayant été adoptée malgré le long voyage depuis le départ de Gênes et le bon état de santé à bord l'autorité sanitaire ordonna que le maïs à débarquer resterait pendant vingt-quatre heures exposé à l'air sur une ou deux gabares ouvertes, et cela quoique ce maïs provint d'un port indemne et que les céréales ne soient pas considérées comme susceptibles d'infection ; même dans le lazaret elles ne peuvent être soumises qu'à une ventilation sous un hangar, suivant l'article 166° du règlement de santé maritime ; que cette décision plus rigoureuse que ne le comportaient les articles 94° et 99° du règlement susdit, portait d'autant plus préjudice aux intérêts de Lavarello que celui-ci ne pouvait surveiller sa marchandise, vu qu'il devait forcément partir le même jour pour Porto Praia, et que le procédé devint tout à fait injustifiable et irrégulier, lorsque le maïs ne fut pas emmagasiné en douane aussitôt après l'expiration des vingt-quatre heures prescrites mais un ou deux jours plus tard ;

Considérant que par conséquent l'autorité de la douane est responsable envers Lavarello, comme propriétaire de la partie de maïs, pour le manque et les avaries que sa marchandise a éprouvées ; et qu'en outre on n'a qu'à lire attentivement le rapport de J. H. Duarte Ferreira, directeur de la douane, daté du 11 juillet 1887 (*Mémoire pour le gouvernement portugais*, p.

100 à 104) pour se convaincre de l'incurie de cette administration à l'égard du maïs en question, le simple comptage des sacs ayant été fait négligemment les sacs ayant été mêlés avec une autre quantité qui appartenait à un autre propriétaire, et un coulage extraordinaire ayant été reconnu en magasin, que le directeur attribue aux charançons et aux rats;

Considérant qu'ainsi il y a lieu de répondre par la négative à la deuxième et par l'affirmative à la troisième question du compromis;

Considérant qu'il y a lieu de fixer le montant de la réparation des dommages pour le sujet de réclamation sub c à 20 pour cent du prix net obtenu pour les 472 sacs de maïs vendus soit 132,466 réis, ou livres 736.30 et pour les 5,386.6 kilogrammes manquants un prix équivalent à la moyenne obtenu par kilogramme pour les sacs de maïs vendus à Gènes, en novembre 1884, savoir livres 11.35 par 100 kilogrammes, faisant une somme de livres 611.38; ensemble livres 1,357.68;

Considérant que la demande n'étant reconnue bien fondée qu'en partie, il est juste de partager les frais du procès;

Nous arbitre, en vertu du pouvoir qui nous est attribué dans cette affaire, concluons le gouvernement de Portugal à payer au gouvernement d'Italie au profit des ayant cause de feu Michelangelo Lavarello, la somme de livres 12,347.68 avec les intérêts moratoires à 5 pour cent par an depuis le 1<sup>er</sup> septembre 1891, date du compromis;

Déclarons la réclamation non-fondée pour le reste;

Mettons à charge de chacune des Hautes Parties la moitié des frais, consistant uniquement dans prix du papier timbré et les honoraires à fixer par le gouvernement des Pays-Bas.

Fait en double à la Haye le 12 mars 1893.—L'arbitre, Heemskerke.

Japan and Peru: Case of the "*Maria Luz*."—In the summer of 1872 the Peruvian bark *Maria Luz*, with a cargo of coolies from China to Peru, put into the port of Kanagawa, in Japan, under stress of weather. The coolies were stated to be free emigrants taking passage under contracts. One night a Chinaman was found alongside of the British man-of-war *Iron Duke* in a state of extreme exhaustion. He was taken on board and cared for, and, after he had recovered, he stated that he had swam from the *Maria Luz*, and craved the protection of the British authorities. He was handed over to the British consul, but the latter delivered him to the Japanese authorities, by whom he was restored to the bark. The subsequent occurrence of similar cases led the British chargé d'affaires, Mr. Watson, to visit the vessel. The master, however, refused to allow him to inspect it, till he had threatened to obtain the assistance of the Japanese authorities, and even then refused to permit a Chinese interpreter to accompany him. The condition of the so-called passengers was found to be distressing. Mr. Watson called for the man who had escaped to the *Iron Duke*, and, when he was reluctantly produced, found that he had been ill-used and that his queue had been cut off. The officers of the bark had evidently undertaken to punish as criminals the men who had tried to escape. Mr. Watson brought this circumstance to the notice of the Japanese Government, represented it as a violation of Japanese jurisdiction and hospitality, and asked that an investigation be made. The Japanese authorities complied with this request, and summoned some of the Chinese to appear as witnesses. Once on shore, the latter refused to return, and

when the master of the bark demanded that they be restored, the Japanese authorities informed him that he might sue for their restoration on their contracts with him. This the master did, but the court, after trial and argument, refused either to decree specific performance of the contracts or to grant damages. Against this decision the master protested.<sup>1</sup> The Peruvian Government supported his claims, and they were at length referred to the arbitration of the Emperor of Russia. The Emperor rendered the following award:

"We, Alexander II., by the Grace of God Emperor of All the Russias;

"In compliance with the request which has been made to us by the governments of Japan and Peru, contained in a protocol drawn up by common consent at Tokel by the plenipotentiaries of the two governments on the 13th and 25th of June 1873, corresponding to the 25th day of the 6th month of the 6th year of Meiji, we have agreed to examine the difference pending between the two governments in connection with the stay of the ship *Maria Luz* in the port of Kanagawa, and particularly the claim of the Peruvian Government tending to render the Japanese Government responsible for all the consequences arising out of the action of the Japanese authorities with respect to the *Maria Luz*, her crew and passengers, at the time of the stay of that ship at Kanagawa; and we have consented to take upon ourselves the task of pronouncing a sentence of arbitration which shall be definite and obligatory for both parties, and as to which no objection, explanation, or delay whatever shall be made.

"Having, consequently, maturely weighed the considerations and conclusions of the juriconsults, and of the competent persons charged to study the affair, from the documents and statements which have been transmitted to us in conformity with the above-mentioned protocol.

"We have arrived at the conviction that in proceeding as it did with regard to the *Maria Luz*, her crew and passengers, the Japanese Government acted in good faith in virtue of its own laws and customs, without infringing the general prescriptions of the law of nations, or the stipulations of particular treaties.

"That therefore it can not be reproached for a willful want of respect, or any malevolent intention, toward the Peruvian Government or its citizens.

"That the various kinds of opinions provoked by this incident may inspire governments who have no special treaties with Japan with a desire to make reciprocal international relations more precise, in order to avoid in the future every similar misunderstanding; for they cannot, in the absence of formal stipulations, cause to be placed upon the Japanese Government the responsibility of action which it has not wittingly provoked, and of measures which are in conformity with its own legislation.

"Consequently we have not found sufficient grounds for recognizing as irregular the acts of the Japanese authorities in the affair of the ship *Maria Luz*; and, attributing the losses sustained to an unfortunate combination of circumstances,

"We pronounce the following sentence of arbitration:

"The Government of Japan is not responsible for the consequences

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<sup>1</sup> For. Rel. 1873, I. 524-553.

which were produced by the stay of the Peruvian ship *Maria Luz* in the port of Kanagawa.

"In faith whereof we have signed the present sentence and have caused our imperial seal to be affixed thereto.

"Done at the Ems the 17th (29th) May 1875.

[SEAL.]

"ALEXANDER.

"(The original is signed by the hand of His Majesty the Emperor.)

"For true copy:

"The acting minister for foreign affairs,

"BARON JOMINI."

**The Netherlands and the Dominican Republic: Case of the "Havana Packet."**—By an agreement signed at The Hague March 26, 1881, the governments of the Netherlands and the Dominican Republic engaged to submit the dispute between them as to the confiscation of the Dutch brig *Harana Packet* to the decision of the President of the French Republic. It appears that in September 1877 the brig was seized, and her master, J. N. Harben, and some of the crew were imprisoned by the Dominican authorities at Monte Cristo on the charge of having had on board some arms and munitions of war, which were brought to the brig while she was loading at Manzanillo, in Cuba, by a boat belonging to Mrs. Isabel Dickenson, a British subject, for importation into a port of the Dominican Republic, in violation of a law of May 19, 1876. The brig was confiscated by a sentence of the court of first instance of February 19, 1878, which was affirmed by the high court of justice on the 15th of the following May. By the agreement above referred to it was provided that the following questions should be submitted to the arbitrator:<sup>1</sup>

"1. Is it proved that there was contraband of war on board the boat of Mrs. Dickerson?

"2. Would the fact of transshipment, during a few hours on board of the *Havana Packet*, of packages belonging to Mrs. Dickerson, even in case those packages contained contraband of war, constitute one of the four cases mentioned in the Dominican law of 1876, and did the Dominican courts, taking as a basis Article 2 of that law, justly pronounce the penalty of confiscation against the *Harana Packet*?

"3. Is the government of the Netherlands right in claiming that, in case the facts charged against Captain Harben are duly proved, the arrest of the captain and the bad treatment inflicted on him, on his crew, and on his passenger, Mrs. Dickerson, even admitting resistance on their side to the execution of the law, and the pillage of the luggage of the latter, even in case that luggage contained contraband of war, constitute violent and illegal acts for which a reparation is due them?

"4. Were the proceedings of the Dominican authorities in the case now submitted to arbitration, in virtue of the law of 1876, compatible with the principles of international law in force among civilized nations, or have the interests injured by the application of that law a right to reparation, and what shall be the amount of the indemnity?"

<sup>1</sup> These questions are translated into English from the French text of the agreement, graciously furnished to me by the Government of the Netherlands.



March 16, 1883, President Grévy rendered an award in favor of the Netherlands for 140,000 francs, to be paid in Paris in money current in France.<sup>1</sup>

**The Netherlands and Venezuela.**—Award of the Queen of Spain on the question of sovereignty over the Aves Islands:

Nos<sup>2</sup> doña Isabel Segunda, por la gracia de Dios y la Constitución de la Monarquía, Reina de las Españas, habiendo aceptado las funciones de juez árbitro que por notas que el Ministro de Relaciones Exteriores de la República de Venezuela y el Ministro Plenipotenciario de S. M. el Rey de los Países Bajos respectivamente dirigieron á nuestro Ministro de Estado, nos han sido conferidas en virtud de un convenio entre las dos Naciones expresadas, firmado el día cinco de agosto de mil ochocientos cincuenta y siete, para que por este nuestro laudo se ponga término á la cuestión suscitada entre ambas sobre el dominio y soberanía de la isla de Aves. Animada del deseo de corresponder dignamente á la confianza que las Altas Partes interesadas nos han manifestado; á cuyo fin hemos examinado escrupulosamente, con la asistencia de nuestro Consejo de Ministros, todos los documentos, memorias y mapas que los referidos Ministros de Relaciones Exteriores de la República de Venezuela y Ministro Plenipotenciario de S. M. el Rey de los Países Bajos han remitido respectivamente á nuestro Ministro de Estado. Resultando de los expresados documentos que las principales razones alegadas por el Gobierno de los Países Bajos en apoyo del derecho que dice asistirle son: 1º. Que en los antiguos mapas aparece un banco de arena que une la isla de Aves con la de Sabá, posesion holandesa, lo cual deja suponer que ambas fueron en algún tiempo un solo territorio. 2º. Que muchos geógrafos, entre ellos algunos venezolanos, citan la isla de Aves entre las Antillas holandesas, dependientes del Gobierno de Curazao, diciendo que está poblada por pescadores holandeses. 3º. Que según una información de testigos, vecinos de Sabá y San Eustaquio, posesiones de los Países Bajos, los habitantes de estas islas tenían y tienen costumbre de ir á pescar tortugas y recoger huevos de aves á las islas de este nombre, donde enarbolaron algunas veces el pabellón de los Países Bajos; y 4º. Que la República de Venezuela, al conceder un privilegio para la extracción del huano que se encuentra en dicha isla de Aves, consignó en una de las cláusulas del contrato, que si era desposeída de aquélla, no quedaría obligada al pago de indemnización alguna. Resultando también que los argumentos que á su vez presenta la República de Venezuela en apoyo de su demanda, son: 1º. Que no existe banco de arena que una la isla de Aves con la de Sabá. 2º. Que la ocupación material de la primera de dichas por individuos particulares que no obran en representación de su Gobierno, sino movidos por un interés personal, no con-

<sup>1</sup> M. Renalt, in the *Annuaire de l'Institut* (1882-83), 290, observed that the award, which had not then been rendered, would probably be of little juridical interest, since it would relate "to a question of fact rather than of law." The award has not been published, but through the courtesy of the French foreign office I am informed of its purport.

<sup>2</sup> Seljas, *El Derecho Internacional Hispano-Americano*, IV. 210. This arbitration was held under a convention between the Netherlands and Venezuela of August 5, 1857.

stituye posesión. 3º. Que todas las islas del Mar Caribe, entre las cuales se cuenta la de Aves, fueron descubiertas por los españoles y al constituirse aquella República con el territorio de la antigua Capitanía general de Caracas, sucedió á España en todos sus derechos á la isla en cuestión. Y 4º. Que el continente venezolano es el territorio de consideración más próximo á la isla de Aves, lo cual le da un derecho de preferencia, haciéndose aplicación del principio establecido en una cuestión análoga entre Inglaterra y los Estados Unidos. Vista la carta geográfica de las Antillas, presentada por el Gobierno de los Países Bajos, en la cual aparece dibujado un banco de arena que va de la isla de Aves á la de Sabá, sin que conste la fecha de este mapa, ni su autor; vistos los calcos de dos mapas ingleses publicados en mil ochocientos dos, en los cuales aparece el mismo banco de arena, bajo la denominación de banco de Aves. Vistos los documentos presentados por el Gobierno de la República de Venezuela, y entre ellos un informe de la dirección hidrográfica de España, en el cual, refiriéndose por error á otras islas de Aves, se asegura que formaron parte de la Capitanía general de Caracas. Vista la Real Orden de trece de Junio de mil setecientos ochenta y seis, en la cual al decretarse la creación de una audiencia en Caracas, para evitar los perjuicios que se originaban á los habitantes de aquella población de tener que acudir para los recursos de apelación á la de Santo Domingo, se disponía que el territorio de esta audiencia se limitase a la parte española de la isla, la de Cuba, y la de Puerto Rico, lo cual indica que la isla de Aves debió quedar sujeta á la audiencia de Caracas. Considerando que si bien algunos geógrafos han dibujado en mapas antiguos el citado banco de arena entre la isla de Aves y la de Sabá; las últimas observaciones hechas sobre el banco enunciado demuestran que no se extiende más allá de doce leguas al Sur de la isla de este nombre, en cuyo punto no se encuentra fondo con ciento sesenta brazas, segun consta de un mapa publicado por el Almirantazgo ingles en mil ochocientos cincuenta y siete. Que hallándose la isla de Aves á unas cuarenta leguas al Sur de Sabá, y terminando el banco á las doce de esta población, es indudable que no existe el banco de arena en una extensión de veinte y ocho leguas, y por consiguiente que no hay unión ni enlace entre las dos islas de Aves y de Sabá. Que aun cuando ambas hubiesen en algún tiempo formado una sola, resulta que al posesionarse el Gobierno de los Países Bajos de la de Sabá, no formaba parte de esta la de Aves, según indican las palabras de Alcedo, autor citado por el Gobierno de los Países Bajos, el cual dice respectado por el Gobierno de los Países Bajos, el cual dice respecto de Sabá . . . "perteneía al principio á los dinamarqueses . . . pero los holandeses enviaron allí una colonia desde San Eustaquio, etc.;" y después habla separadamente de la isla de Aves, lo cual da á conocer que Sabá y la isla de Aves eran dos islas separadas cuando los holandeses entraron en posesión de la primera. Considerando que en las citas geográficas que presenta el Gobierno de los Países Bajos en apoyo de su demanda aparece una gran confusión, refiriéndose muchas de ellas á otras islas de Aves distintas de la que es objeto de la cuestión, á la cual no se asigna por la generalidad de los geógrafos una nacionalidad determinada. Considerando que para dar importancia en materia de propiedad á la autoridad de los geógrafos es necesario que todos ó una gran parte estén unánimes y conformes en determinar la nacionalidad de un territorio dado, y faltando esta

circunstancia en el caso presente, se requieren otros títulos de más fuerza y validez que la opinión de los geógrafos. Considerando que si bien aparece comprobado el hecho de que los habitantes de San Eustaquio, posesión neerlandesa, van á pescar tortugas y recoger huevos á la isla de Aves, este hecho no puede servir de apoyo al derecho de soberanía, porque solamente significa una ocupación temporal y precaria de la isla, no siendo la pesca en este caso un derecho exclusivo, sino la consecuencia del abandono de ella por parte de los habitantes de las comarcas inmediatas, ó por su legítimo dueño. Considerando que si bien la República de Venezuela, al conceder un privilegio para la extracción del huano de la isla de Aves, pactó que no se le pudiera exigir indemnización si era desposeída de aquel territorio, esta condición nada prueba en favor de la pretensión de los Países Bajos, porque sólo demuestra una sensata precaución por parte de la República y el natural respeto al estado de litigio en que se encuentra la isla. Considerando que en este resumen el Gobierno neerlandés sólo ha probado que algunos de sus súbditos avicinados en San Eustaquio y Sabá, van á pescar tortugas y recoger huevos en la isla de Aves desde mediados del siglo diez y ocho, y que con este objeto suelen habitar la isla tres ó cuatro meses al año. Considerando que á su vez funda Venezuela principalmente su derecho en el de España antes de que aquella República quedase constituida como Estado independiente, y si bien resulta que España no ocupó materialmente el territorio de la isla de Aves es indudable que le pertenecía como parte de las Indias Occidentales que eran del dominio de los Reyes de España, según la ley primera, título quince, libro segundo de la Recopilación de Indias. Considerando que la isla de Aves debió formar parte del territorio de la audiencia de Caracas, cuando ésta fué creada en trece de junio de mil setecientos ochenta y seis, y que al constituirse Venezuela como Nación independiente, lo hizo con el territorio de la Capitanía general de su nombre, declarando con posterioridad vigentes en el nuevo Estado todas las disposiciones adoptadas por el Gobierno español hasta mil ochocientos ocho, por lo cual pudo considerar la isla de Aves como parte de la Provincia española de Venezuela. Considerando que aun hecha abstracción de lo que antecede, resulta siempre que, si bien puede decirse que la isla Aves nunca fué real y verdaderamente ocupada por España y habitada por españoles, tampoco la residencia temporal en ella de algunos naturales de Sabá y San Eustaquio es más que una ocupación precaria que no constituye posesión; pues aun cuando la isla no es capaz de habitación permanente por razón de las inmersiones á que se halla expuesta, si los holandeses la hubieran ocupado con ánimo de adquirirla, juzgándola abandonada, habrían construido algún edificio y tratado de hacer la isla habitable constantemente, cosas ambas que no llegaron á tener efecto. Y considerando por último que el Gobierno de los Países Bajos no ha hecho otra cosa que utilizar la pesca en dicha isla por medio de sus colonos, al paso que el Gobierno de Venezuela ha sido el primero en tener allí fuerza armada, y en ejercer actos de soberanía, confirmando así el dominio que adquirió por un título general derivado de España. Es nuestro parecer, conforme con el de nuestro Consejo de Ministros, después de oído el dictamen de nuestro Consejo de Estado en pleno, que la propiedad de la isla en cuestión corresponde á la República de Venezuela, quedando á cargo de ésta la indemnización por la pesca que los súbditos

holandeses dejarán de aprovechar, si en efecto se les priva de utilizarla, en cuyo caso servirá de tipo para dicha indemnización, el producto líquido anual de la pesca calculado por el último quinquenio, capitalizándolo al cinco por ciento.

Dado en nuestro Palacio de Madrid, á treinta de Junio de mil ochocientos sesenta y cinco. [Firmado.] Isabel. [L. S.] El Ministro de Estado. [Firmado.] *Manuel Bermúdez de Castro*. (Memoria de Relaciones Exteriores de Venezuela, 1866.)

Consulat Général des Pays Bas à Caracas. Señor Ministro: Como lo sabe V. E., el Gobierno de España dió en Junio de 1865 una decisión arbitral en la cuestión entre los Países Bajos y Venezuela referente al derecho de propiedad sobre la isla de Aves.

Según el último artículo de esta decisión, pertenece dicha isla en propiedad á la República de Venezuela; con la obligación de pagar una indemnización por el derecho de pesca de que los súbitos neerlandeses cesan de hacer uso, á lo menos si se les impidiera este derecho, caso en el cual se tomará como base de la indemnización el producto limpio de esta pesca durante los últimos cinco años, capitalizado al cinco por ciento.

El Gobierno de los Países Bajos está dispuesto á descansar en esta decisión. Por lo que toque á las dos alternativas mencionadas, la continuación de nuestro derecho de pesca ó bien la compra por Venezuela de este derecho, el Gobierno de los Países Bajos está dispuesto á contentarse con la continuación del derecho mencionado.

Después de la conversación que yo tuve el honor de tener con V. E. tocante á este asunto, creo poder confiar que el Gobierno de Venezuela por su parte se decide también por la misma alternativa.

Tomo la libertad de pedir á V. E. se sirva comunicarme la decisión de su Gobierno sobre el particular, que so tendré el gusto de comunicar tan pronto como sea posible el Gobierno del Rey.

Aprovecho esta ocasión para ofrecer á V. E. las seguridades de mi alta consideración.

El Cónsul General de los Países Bajos. (Firmado.) *Rolandus*.—Caracas: 1º de Mayo de 1866.—Señor Ministro de Relaciones Exteriores.—Caracas.

Estados Unidos de Venezuela. Ministerio de Relaciones Exteriores.—Sección Central.—Número 105.—Caracas, Mayo 5, 1866. Año 3º de la Dey y 8º de la Federación. Señor Cónsul: He tenido el honor de recibir y leer el Gran Ciudadano Mariscal Presidente de los Estados Unidos de Venezuela, el oficio que U. S. me dirigió en 1º de este mes en cuanto al asunto de la isla de Aves.

La cuestión del dominio y soberanía de dicha isla, que Venezuela y los País Bajos si disputaban, fue sometida, por convenio de 5 de Agosto de 1857, al arbitramento de la Reina de España. U. S. me participa ahora que se Gobierno ha admitido el fallo que se pronuncie por S. M. C. Otro tanto ha hecho Venezuela.

Esta sentencia declara ser la isla propiedad de la República; pero al mismo tiempo le impone la obligación de indemnizar á los Países Bajos, si se priva á sus súbditos de utilizar la pescar en ella. Con tal motivo pregunta U. S. que prefiere Venezuela si dejarles el uso de la pesca ó rescatar semejante derecho. Y el Gran Ciudadano Mariscal, después de haber

deliberado sobre el particular, me ha autorizado para responder que Venezuela opta por el primer extremo, ó sea la continuación de la pesca en la isla por súbditos de S. M. N.

Al participarlo á US. le renuevo las protestas de mi consideración distinguida.

Dios y Federacion. (Firmado.) *Rafael Seijas*. Senor T. D. G. Rolandus, Cónsul General de los Países Bajos.—(Memoria de Relaciones Exteriores de Venezuela, 1867.)

**Peru and Bolivia.**—By a protocol signed at Lima August 26, 1895, through the mediation of the representatives of the Holy See, France, Colombia and Italy, Peru and Bolivia agreed to refer to the arbitration of some South American government the question whether Peru should salute the Bolivian flag as part of the reparation for certain acts committed during the civil war in Peru of 1890.

By another protocol of September 6, 1895, it was agreed to submit the matter to the Government of the United States of Brazil, or, if it should decline, to that of the Republic of Colombia.<sup>1</sup>

**Portugal and the Congo.**—"By identic notes of February 7, 1890, the governments of Portugal and the independent State of the Congo inquired of the federal council whether it would be disposed eventually to accept the rôle of arbitrator in respect of the differences which might arise between the two states on the occasion of the delimitation of their boundaries in Africa, and which might not be directly and amicably settled. On the 18th of the same month the federal council decided to answer in the affirmative. No occasion, however, arose for action in the matter, all the difficulties which the delimitation raised having been done away with as the result of an agreement between the parties by the convention signed at Brussels May 25, 1891, of which the interested governments informed us by notes of July 27, last."<sup>2</sup>

**Two African Tribes.**—"In 1887 a strong ill feeling which had existed between two South African nations—the Bakwena and the Bamangwato—and which had more than once been on the point of breaking out into open war was completely allayed by a simple arbitral award, which was loyally and gladly accepted by both. Amongst other causes of this ill feeling there had been a dispute about the rights to certain wells at a place called Lopepe, on the road to the north from Molepole to the Bamangwato. The dispute was brought before the administrator of Bechuanaland, who sent one of his officers, Capt. H. Goold Adams, to act as arbitrator between the two parties. His decision was to the effect that as the water in times past had been used by both peoples the wells, with the surrounding land, should be equally divided. This was at once done. The court was sitting in the vicinity of the disputed territory. The tribes adjourned to the wells. The chiefs divided the ground by drawing a line across it; beacons were raised to mark the division; a burden seems to have been lifted from everybody's shoulders, and amidst great rejoicing

<sup>1</sup> I am indebted for copies of these protocols to Señor Don Victor Eguiguren, Peruvian minister at Washington.

<sup>2</sup> Rapport du Département Fédéral des Affaires Étrangères [de Suisse], 1891, p. 30.

friendly intercourse was opened up at once. A missionary who was present, and whom since this paper was first written I have heard give a very interesting description of the whole proceeding, wrote that 'it was a meeting worth going a hundred miles to see.'<sup>1</sup>

### 3. MEDIATION.

It is important, from the practical as well as from the theoretical side of the matter, to keep in view the distinction between arbitration and mediation—a distinction either not understood or else lost sight of by many of those who have undertaken to discuss the one subject or the other. Mediation is an advisory, arbitration a judicial, function. Mediation recommends, arbitration decides. And while it doubtless may be true that nations have, for this reason, on various occasions accepted mediation when they were unwilling or reluctant to arbitrate, it is also true that they have settled by arbitration questions which mediation could not have adjusted. It is, for example, hardly conceivable that the question of the Alabama claims could have been settled by mediation. The same thing may be said of many boundary disputes. In numerous cases the efforts of mediators have been directed, and successfully directed, to bring about an arbitration as the only means of putting an end to controversy.

But, while bearing in mind the distinctively judicial character of arbitration, it would not be proper to minimize the importance of mediation as one of the forms of amicable negotiation. The Congress of Paris of 1856, as well as the Congo Conference of 1884, made a declaration in favor of systematic mediation.<sup>2</sup>

**The Seistan Boundary.**—The treaty between Great Britain and Persia of March 4, 1857, provides: "In case of differences arising between the Government of Persia and the countries of Herat and Afghanistan, the Persian Government engages to refer them for adjustment to the friendly offices of the British Government, and not to take up arms unless those friendly offices fail of effect." It seems that in 1877 a dispute as to the boundary between Persia and Afghanistan (the "Seistan boundary") was amicably settled through the mediation of two British officers, Generals Goldsmith and Pollock, at Teheran.<sup>3</sup>

**The boundary between Greece and Turkey.**—By Article XXIV. of the Treaty of Berlin of July 13, 1878, Austria-Hungary, France, Germany, Great Britain, Italy, and Russia, in the event of Greece and Turkey being unable to agree upon the "rectification" of frontier suggested in the thirteenth protocol of the Berlin congress, reserved to themselves "to offer their mediation to the two parties to facilitate negotiations." As the frontier was not "rectified," Lord Salisbury proposed to the Porte that the task should be committed to an international commission. To this proposal the Sultan failed to make "a definite reply," and the powers by an identic note of June 11, 1880, informed him that they had decided that

<sup>1</sup> The More Recent Progress of International Arbitration, by W. Evans Darby, I.L. D., p. 5.

<sup>2</sup> See Calvo, *Le Droit Int.* 4th ed. III. 413.

<sup>3</sup> Appleton, *Progress of International Arbitration*, 6.

their representatives at Berlin should meet in conference there on the 16th of June, in order to determine by a majority of votes upon the best line to adopt. July 1, 1880, the representatives made an award, by which they unanimously adopted a line therein defined.<sup>1</sup> July 15, 1880, collective notes were addressed by the powers to Greece and the Porte, "interposing their mediation, and inviting those two governments to accept" the line in question.<sup>2</sup> A "new rectification" was subsequently made and the frontier was finally settled by a treaty of May 24, 1881, between Austria-Hungary, France, Germany, Great Britain, Italy, Russia, Greece, and Turkey.<sup>3</sup>

**Fiji land claims.**—The adjustment of land titles in Fiji by the British authorities after the assumption by Great Britain of sovereignty over the group, gave rise to claims on the part of certain foreigners, who alleged that they had suffered injustice. Among the claimants were some German subjects, who appear to have been four in number. Their claims were referred to two commissioners, Dr. R. Krauel, on the part of Germany, and Mr. R. S. Wright, on the part of Great Britain, for investigation and report. The commissioners concurred in rejecting one of the claims, and in recommending that certain sums, aggregating £10,620, be paid on the others. The two governments agreed to accept this report, and the money was duly paid.<sup>4</sup>

**The Caroline Islands.**—In 1885 His Holiness Leo XIII. made, as mediator between Germany and Spain in the controversy touching the Caroline and Pelew islands, the following "proposition:"

"The discovery made by Spain in the sixteenth century of the Caroline and Pelew islands, which form part of the archipelago, and a series of acts accomplished at different periods by the Spanish Government in those same islands for the good of the natives, have, in the conviction of that government and of that nation, created a title to the sovereignty founded on the maxims of international law invoked and followed at that period in the case of analogous disputes. In fact, when one examines the history of the above-mentioned acts, the authority of which is confirmed by divers documents in the archives of the Propaganda, one can not fail to recognize the beneficial work of Spain towards those islanders. It is also to be remarked that no other government has ever exercised a similar action over them. This explains the constant tradition, which must be taken

<sup>1</sup> Br. and For. State Papers, LXXI. 699.

<sup>2</sup> Hertslet, Map of Europe by Treaty, IV. 2961.

<sup>3</sup> The following passage seems to refer to a case of mediation rather than of arbitration: "Persia-Afghanistan, 1891: Early in the year the Hashtadan question between Persia and Afghanistan was finally laid to rest. This was a frontier dispute relating to the district of Hashtadan, which had lasted for several years and at one time threatened to become serious. The Viceroy of India was, however, appointed arbitrator. He intrusted the matter to General MacLean, the British consul-general at Meshed, who gave his award in the Viceroy's name, and it was immediately ratified by both the Shah and the Ameer." (Darby, *The More Recent Progress of International Arbitration*, II.)

<sup>4</sup> Br. and For. State Papers, LXXVI. 887-889. The full record of the transaction may be found in *Parliamentary Papers* [c. 4433], 1885.

into account, and the conviction of the Spanish people relative to that sovereignty—tradition and conviction which two months ago were manifested with such an ardor and animosity, capable for a moment of compromising the internal peace and relations of two friendly governments.

"On the other hand, Germany and England in 1875 expressly informed the Spanish Government that they would not recognize the sovereignty of Spain over the said islands. On the contrary the Imperial Government thought it is the effective occupation of a territory which creates the sovereignty, occupation which was never carried into effect on the part of Spain in the Caroline Islands. It was in conformity with this principle that it acted in the Island of Yap, and in that, as on its part the Spanish Government has also done, the mediator is pleased to recognize the complete *loyalty* of the Imperial Government.

"Consequently, and in order that this divergence of views between the two governments be not an obstacle to an honorable arrangement, the mediator, after having well considered the whole question, proposes that in the new convention to be stipulated they shall observe the forms of the protocol relative to the Sooloo Archipelago signed at Madrid on the 7th of March last between the representatives of Great Britain, Germany, and Spain, and that the following points be adopted:

"1. To confirm the sovereignty of Spain over the Caroline and Pelew islands.

"2. The Spanish Government to render her sovereignty effective engages to establish as quickly as possible in that archipelago a regular administration with sufficient force to guarantee order and the rights acquired.

"3. Spain offers to Germany full and entire liberty of commerce and navigation, and of fishing at the same islands, as also the right of establishing a naval station and a coal depot.

"4. The liberty of making plantations in those islands, and of founding agricultural establishments on the same footing as Spanish subjects, to be also guaranteed to Germany.

"L. CARD. JACOBINI.

"ROME, FROM THE VATICAN, *October 22, 1885.*"

This proposition was accepted by the governments to which it was made, and was embodied in the following protocol:

"The undersigned, his excellency the Marquis de Molins, ambassador of His Catholic Majesty near the Holy See, and his excellency M. de Schloezer, envoy extraordinary and minister plenipotentiary of His Majesty the King of Prussia near the Holy See, being duly authorized to conclude the negotiations which the Governments of Spain and Germany, under the accepted mediation of His Holiness the Pope, have pursued in Madrid and Berlin relatively to the rights which each of said governments may have acquired to the possession of the Caroline and Pelew islands, considering the propositions made by His Holiness as a basis for a mutual understanding, have agreed upon the following articles in accordance with the propositions of the august mediator.

"ARTICLE 1. The German Government recognizes the priority of the Spanish occupation of the Caroline and Pelew islands and the sovereignty of His Catholic Majesty as specified, and the limits of which are indicated in article 2.



"ARTICLE 2. These limits are formed by the equator and by the eleventh degree of north latitude and the one hundred and thirty-third and the one hundred and sixty-fourth degrees east longitude (Greenwich).

"ARTICLE 3. The Spanish Government, to guarantee to German subjects full and entire liberty of commerce, navigation, and fishing in the Caroline and Pelew archipelagoes, undertakes to carry out in the said archipelagoes stipulations analogous to those contained in Articles I., II., and III., of the protocol regarding the Sooloo Archipelago, signed at Madrid on the 11th of March 1875, and reproduced in the protocol of the 7th of March 1885, as follows:

"I. 'The commerce and traffic of German ships and subjects with the Caroline and Pelew Archipelagoes and in all parts thereof, as also the rights of fishing, shall, without prejudice to the rights of Spain, as recognized by the present protocol, be absolutely free in conformity with the following declarations:

"II. 'The Spanish authorities can not in the future require that the ships and subjects of Germany, which repair freely to the Caroline and Pelew Archipelagoes or from one point to another of them without distinction, or from thence to any other part of the world, shall touch, either before or afterwards, at any determined points in these archipelagoes or elsewhere, or that they shall pay dues of any kind, or be required to obtain permission from the authorities, who on their part shall abstain from any intervention, or in placing any impediment in the way of the said traffic. It is at the same time understood that the Spanish authorities shall in no way, nor under any pretext, impede the free importation and exportation of whatever kind of merchandise without exception, except at the points occupied in conformity with Declaration III.; and likewise that at all the points not effectively occupied by Spain neither the ships nor the subjects aforesaid, nor their merchandise, shall be subjected to any imports or duties or payments of any kind, nor to any sanitary regulations or other.

"III. 'At all points occupied by Spain in the Caroline and Pelew Archipelagoes the Spanish Government can establish duties and sanitary and other regulations during the effective occupation of the points indicated.'

"But on her side Spain undertakes to maintain the establishments and officials necessary for the requirements of commerce and the observance of the said regulations. It is nevertheless expressly understood, and the Spanish Government, being resolved not to improve restrictive regulations at the points occupied, voluntarily undertakes not to introduce at those points imposts or duties of a higher rate than those fixed by the Spanish tariffs or by the treaties or conventions between Spain and all other powers. Neither will she put in force exceptional regulations applicable to German commerce and subjects, who shall in all respects enjoy the same treatment as Spanish do.

"In order to anticipate any claims or complaints which may result through commercial uncertainty with respect to the points occupied and subjected to the regulations and tariffs, the Spanish Government will in each case of the effective occupation of a point in the Caroline and Pelew Archipelagoes make communication thereof to the German Government and at the same time inform commerce by means of a public notification

in the official journals of Madrid and Manila. As regards the tariffs and regulations to be applied at the points which are or shall be occupied by Spain, it is stipulated that they shall not be enforced or levied until after a delay of eight months from the date of the publication in the official journal of Madrid.

"It is understood that no German ship or subject shall be obliged to touch at one of the points occupied either on going to or returning from a point not occupied by Spain, and that no penalty can be inflicted on German subjects for this reason, nor for any kind of merchandise destined for a point not occupied in the Caroline and Pelew Archipelagoes.

"ARTICLE 4. German subjects shall have full liberty to purchase and make plantations in the Caroline and Pelew Archipelagoes, to found agricultural establishments, to exercise all kinds of commerce, and to make contracts with the inhabitants and utilize the land (*d'exploiter le sol*) under the same conditions as Spanish subjects. All their acquired rights shall be safeguarded. German companies which enjoy recognized rights in their own country, and especially anonymous companies (*compagnies anonymes*), shall be treated on the same footing as the aforesaid subjects.

"German subjects shall enjoy for the protection of their persons and their goods the acquisition and transmission of their properties, and for the exercise of their professions, the same treatment and the same rights as Spanish subjects.

"ARTICLE 5. The German Government shall have the right of establishing in one of the Caroline or Pelew Islands a naval station and a coal depot for the imperial navy. The two governments will determine by common consent the place and conditions of that establishment.

"ARTICLE 6. If the governments of Spain and Germany have not refused their adhesion to this present protocol within a period of eight days from this date, or if by the intermission of their respective representatives they notify their adhesion within that period, the present declaration shall immediately enter into force.

"MARQUIS DE MOLINS.  
"SCHLÖZER.

Done at Rome the 17th December 1885."

**The Loochoo question.**—It has often been stated that the Loochoo (Lew Chew) question between China and Japan was settled in 1879 by General Grant as arbitrator. The statement is inaccurate. The question was neither arbitrated nor settled, though there was an attempt to settle it by mediation. Loochoo was regarded by China, not as an integral part of the empire, but as a kind of honorary dependency. Since 1655 the Loochooan kings had received investiture from China; they had sent to Peking complimentary missions, which brought presents and received presents in return. The Chinese had no resident officers in Loochoo; they levied no taxes there, nor any determinate tribute; they neither aided nor required aid from the Loochooans in war, nor concerned themselves with their internal affairs. Japan, on the other hand, had for a long time required Loochoo to deliver to the Prince of Satsuma, in Japan, an annual contribution of 8,000 piculs, or about 500 tons of rice.<sup>1</sup> In 1878 Chinese

<sup>1</sup> Mr. Seward, U. S. minister at Peking, to Mr. Evarts December 11, 1879, For. Rel. 1880, 94. See also Mr. Denby to Mr. Bayard, For. Rel. 1888, I. 222.

plenipotentiaries at Tokio addressed themselves to the minister of the United States at that capital, invoking the good offices of the United States, in accordance with the first article of the treaty of Tientsin, to bring about an amicable agreement between their government and that of Japan in regard to Loochoo. They called attention to a memorial of certain commissioners from Loochoo, in which it was stated that Japan had enforced its rule on that state and had compelled it to cease paying "tribute" to China and to turn over its treaty with the United States to the Japanese foreign office.<sup>1</sup> May 2, 1879, the young prince of Loochoo, accompanied by his suite, arrived at Yokohama in a steamer which had been dispatched by the Japanese Government to bring his father, the ex-king, to Japan. The father, however, had alleged illness and it was decided to bring the son. After the latter arrived in Japan, the Japanese prime minister informed him that "for public reasons" he was ordered to remain in Tokio. Japan thus manifested an intention to maintain what had been done in the islands in the way of change. The islands had been made in due form a ken of the empire; Japanese were installed in the chief offices; the king had only the rank of a Japanese noble; and the principal gentry were pensioned. The subordinate local officials had been retained, and the people seemed to be content. The Chinese minister at Tokio limited his action to remonstrance, though he had formerly expressed a purpose to return to China if Japan should persist in her course.<sup>2</sup>

At this time General Grant was on his journey around the world, and while he was in China, he was requested by Prince Kung and Li Hung Chang to use his good offices in the Loochoo matter. He promised to do so, and while he was in Japan conferred (July 1879) with Count Ito and General Saigo, then respectively minister of the interior and minister of war, who waited upon him at Nikko.<sup>3</sup>

The mediation was without practical result. March 11, 1880, the Japanese Government issued a proclamation notifying all persons having claims against the late Loochoo Han to present them to the Japanese finance department before the 30th of the next May, and stating that claims so presented would, if contracted since 1844, be paid in government bonds and money. The proclamation also declared that money, grain, and other things payable to the late Loochoo Han, under contracts made since 1844, would be collected according to the contracts.<sup>4</sup> Subsequently it was understood that the question of sovereignty would be amicably arranged by China taking one of the islands and Japan retaining the rest;<sup>5</sup> but negotiations undertaken at Peking for a settlement ended in a rupture, the Japanese minister taking his departure on the ground that the Chinese representatives had refused to sign the treaties after agreeing upon them.<sup>6</sup>

<sup>1</sup> For. Rel. 1879, 606.

<sup>2</sup> Mr. D. W. Stevens to Mr. Evarts, May 13, 1879, For. Rel. 1879, 637.

<sup>3</sup> Young's Around the World with General Grant, II. 410, 546, 558-562.

<sup>4</sup> For. Rel. 1880, 686.

<sup>5</sup> Mr. Bingham to Mr. Evarts, November 6, 1880, MS. dispatches from Japan.

<sup>6</sup> Mr. Angell to the Dept. of State, January 15, 1881, MS. dispatches from China; Dept. of State to Mr. Angell, April 4, 1881, MS. instructions to China; Mr. Angell to Dept. of State, June 6, 1881, MS. dispatches from China.

Late in the autumn of 1881 China sent a minister to Japan to treat.<sup>1</sup> A year afterwards it was reported that both governments desired the good offices of the United States.<sup>2</sup> Still another year elapsed and the question was apparently no nearer a settlement than before.<sup>3</sup> In the summer of 1884, owing to the relations between France and China, the opinion was expressed that the Loochoo question was not likely to be revived.<sup>4</sup>

**Spanish Peace Conference.**—The most notable of all the mediations of the United States is that which was begun in 1866 and concluded in 1872 for the purpose of bringing to a close the war between Spain, on the one hand, and the allied republics of Peru, Chile, Bolivia, and Ecuador, on the other.

December 20, 1866, Mr. Seward, as Secretary of State, instructed the diplomatic representatives of the United States near the belligerent governments to propose to those governments that a conference be held in Washington on the 1st of the next April between plenipotentiaries authorized to treat of all matters in difference and to agree upon terms of a permanent peace between the belligerent powers. The President of the United States was to designate some one to preside in the conference and render good offices by information and advice. The person so designated was to have no vote, but, in case of disagreement of the plenipotentiaries, the President of the United States was to designate some neutral state or sovereign to decide finally, as umpire, all questions which should be referred to him by the conference.<sup>5</sup> An armistice was to take place so soon as all the belligerents should have accepted the proposals of the United States, and then to continue till the end of the conference.

Spain accepted the proposals on condition (1) that some period be fixed for the submission to the conference of the facts on which, if the plenipotentiaries should fail to agree, the submission to arbitration should be made, and (2) that some restrictions be adopted as to the selection of the arbitrator.<sup>6</sup>

Bolivia was disposed to assent to whatever might be agreed on by Chile and Peru.<sup>7</sup> The attitude of Ecuador was substantially the same.<sup>8</sup> Chile was willing to accept the proposals only on the conditions, among others, (1) that Spain acknowledge that the bombardment of Valparaiso was "an act of hostility inexcusable and worthy of the most severe reprobation," and (2) that it must be admitted before the arbitrator that "the occupation of the Chincha Islands on the 14th of April 1864, and the blockade of the ports of Chile on the 26th of September 1865," were unjust acts of aggression." The Peruvian Congress directed the executive to reject mediation till Spain should have "declared its acts \* \* \* at the Chincha Islands and \* \* \* at Valparaiso violations of international law," and, besides communicating the declaration to friendly gov-

<sup>1</sup> Mr. Holcomb to Dept. of State, November 24, 1881, MS. dispatches from China.

<sup>2</sup> Mr. Young to Dept. of State, October 9, 1882, MS. dispatches from China; same to same, February 22, 1883.

<sup>3</sup> Mr. Young to Dept. of State, March 22, 1883; May 9, 1883.

<sup>4</sup> Mr. Young to the Dept. of State, July 24, 1884.

<sup>5</sup> Dip. Cor. 1867, I. 517. <sup>7</sup> Dip. Cor. 1867, II. 259. <sup>8</sup> Dip. Cor. 1867, II. 267.

<sup>6</sup> Dip. Cor. 1867, I. 520. <sup>8</sup> Id. 287.

ernments, should have "withdrawn the Spanish squadron from the waters of the Pacific."<sup>1</sup>

March 27, 1868, Mr. Seward sent another circular instruction to the United States ministers near the belligerent powers. This instruction was very brief, and merely stated that the "technical continuance" of the state of war occasioned to neutral powers, and especially to the United States, "inconvenience" which it was desirable to terminate "by a formal armistice;" that, if this suggestion should be well received, it should be suggested that the belligerents appoint plenipotentiaries to meet in Washington "for the purpose of bringing about a definite peace;" and that, if the advice of the United States should be asked, a "proper and impartial effort" would be made "to see that the claims of all shall receive due consideration."<sup>2</sup>

Spain substantially accepted these proposals.<sup>3</sup> Chile thought that the "irreconcilable character of the pretensions of the belligerents" made the conclusion of "a definite peace" impossible, but intimated a readiness to accept "a truce definite in its character, which, while preserving to the belligerents their respective pretensions," offered to neutrals "all the guarantees and securities which they claim." Chile also referred with apparent favor to a proposition of indefinite truce which had been offered by France and Great Britain as mediators.<sup>4</sup> Peru was disposed to accept the proposals unreservedly,<sup>5</sup> as was also Ecuador. Bolivia concurred with Chile in preferring an "indefinite truce" to a definite peace.<sup>6</sup>

When Mr. Fish became Secretary of State, the matter still remained unadjusted. He therefore sent to the ministers of the United States near the now nominally belligerent powers the following instruction:

[Circular.]

"No. 124.]

"DEPARTMENT OF STATE,

"Washington, October 22, 1869.

"To HENRY M. BRENT,

*Sec., Sec., Sec., Lima.*

SIR: You are aware of the hesitation and the obstacles to an acceptance by the belligerent Spanish-American republics on the Pacific of the offer of mediation between them and Spain contained in the instruction of this Department of the 20th of December 1866 and the circular of the 28th March 1868. It appears from a protocol of a conference held between the representatives of those republics at Lima in September of last year that the propositions of the United States were unequivocally accepted by the representatives of Peru and Ecuador, and by that of Bolivia subject to a reference to his government. In a note to this Department of the 8th of October 1868, accompanied by a copy of that protocol, Mr. Garcia, then minister of Peru accredited to this government, says that there was no reason for doubting that Chile also would shortly accede to the views of the majority of her allies. In a despatch to this Department of the 14th of May last, General Hovey, the United States minister at Lima, states

<sup>1</sup> Dip. Cor. 1867, II, 767.

<sup>4</sup> Dip. Cor. 1868, II. 15, 322, 325, 326.

<sup>2</sup> Dip. Cor. 1868, II. 6.

<sup>5</sup> Dip. Cor. 1868, II. 877, 892.

<sup>3</sup> Dip. Cor. 1868, II. 7.

<sup>6</sup> Dip. Cor. 1868, II. 910.

that he had recently been informed by the Peruvian minister for foreign affairs that all those republics had determined to accept the terms of conference proposed by the United States. There is reason to believe that a similar disposition is entertained by Spain. You will consequently propose to the Peruvian Government that it instruct and empower its representative here to meet the representatives of the other parties on the 15th of January next, for the purpose of a conference with a view to a formal armistice if not a definitive peace.

"It is proper to add that a draft of this instruction has been submitted to Mr. Roberts, the Spanish minister here, who has addressed a note upon the subject to the Department; of which I enclose a transcript, containing a substantial acceptance of the proposition of the conference in this city at the time indicated. You will communicate the views of the Peruvian Government upon the subject to which this instruction refers, at the earliest practicable moment.

"I am, sir, your obedient servant,

"HAMILTON FISH."

This proposal was accepted by all the parties concerned, but the conference did not begin on the day named, because the representatives of some of the powers had then not arrived at Washington.

The conference was opened at the Department of State, October 29, 1870. There were present Hamilton Fish, Secretary of State; Don Mauricio Lopez Roberts, envoy extraordinary and minister plenipotentiary of Spain; Col. Don Manuel Freyre, envoy extraordinary and minister plenipotentiary of Peru; Don Joaquin Godoy, envoy extraordinary and minister plenipotentiary of Chile; and Don Antonio Flores, minister resident and plenipotentiary of Ecuador.

The proceedings were opened by Mr. Fish, who, after reading the power by which the President had authorized him to act on behalf of the United States, delivered the following address:

"GENTLEMEN: Notwithstanding the lapse of time since this conference was first proposed, I am still happy to meet you on such an occasion, and trust that your proceedings may lead to a result earnestly desired by this government, the restoration of a permanent peace and good understanding between nations of the same blood, all of whom we may call our friends.

"Strifes between a parent country and the independent states which may have sprung from her are always to be deplored. Sentiment, at least, dictates that they should be of rare occurrence, should never be allowed to arise without adequate cause, and should be healed as soon and as thoroughly as may be practicable. Unfortunately, conflicts of interests, real or supposed, may, in the course of time, be expected among all nations; and however potent may be the tie of consanguinity between them, that must then yield to the stronger feeling.

"The regions embraced by the belligerent republics of the Pacific are acknowledged to be among the most favored on the globe for vast physical resources. The development of these, and the consequent happiness and prosperity of their inhabitants, depend upon the enjoyment of that peace without which capital will not seek for employment and labor will not receive its reward. It may be assumed that those republics have no disposition to attack their mother country at home.

"This meeting having first been proposed in a circular of Mr. Seward, of the 20th of December 1867 (1866), was accepted conditionally by Spain and Chile; but the conditions proposed by each not having been accepted by the other, the conference did not take place.

"Mr. Seward, accordingly, in another circular of the 27th of March 1868, again suggested a congress of plenipotentiaries at Washington for the purpose of bringing about a definitive peace.

"This suggestion not having been complied with, Mr. Fish, in another circular of the 22d of October 1869, proposed a conference here on the 15th of January last, with a view to a formal armistice, if not a definitive peace.

"The conference, however, did not take place at the time suggested, the representatives of some of the parties not having then reached the United States.

"The conference being now in session, the points for its consideration seem to be—

"1st. Is an armistice or truce, with its terms reduced to writing, desirable for the parties? Shall that armistice or truce be indefinite in point of time or shall its duration be limited?

"Supposing that the parties should or should not determine upon the expediency of an armistice, would they then be prepared to enter upon the discussion of the terms of a permanent peace?

"The President of the United States, in appointing me to preside at this conference, did not intend to confer upon me any power to vote therein or to assume any obligation on the part of this government. His purpose has been, as the common friend of the parties, to bring their representatives together, in order that differences may be reconciled.

"May your deliberations result in obtaining an ample guaranty against future hostilities.

"Mutual stipulations to that effect will be approved by all the common friends of the belligerents, and especially by those whose intercourse with either of them might be interrupted or lessened by that sudden renewal of active war which, technically, at least, might not be unlawful so long as the existing state of affairs shall continue.

"DEPARTMENT OF STATE,

"Washington, October 29, 1870."

Having read the address, Mr. Fish inquired whether each of the gentlemen present was duly authorized to take part in the conference. This inquiry was satisfactorily answered by the production and mutual examination of their full powers.

Owing to the absence of the representative of Bolivia, without whom the representatives of the other allies were not by their instructions authorized to proceed, the conference was adjourned till it should again be convoked by the Secretary of State.

A protocol of the first meeting, containing substantially what has been above stated, was signed by all the members of the conference present.

April 11, 1871, the conference reconvened, the plenipotentiary of Peru appearing also as plenipotentiary *ad hoc* of Bolivia; but, as he had not received authority from his own government so to appear, he announced that he would act in the name of Bolivia *ad referendum*. This declaration

having been accepted, the powers conferred by Bolivia were exhibited, and were found to be in due form. The conference then proceeded to discuss the articles of an armistice, which were agreed upon and signed.

By these articles "the suspension of hostilities existing *de facto*" between Spain and the allied republics was "converted into a general armistice or truce," which was to "continue indefinitely" and could not be broken by any of the belligerents "save in three years after having expressly and explicitly notified the other," through the Government of the United States, "of its intention to renew hostilities;" and it was provided that during the continuance of the armistice all restrictions on neutral commerce which were incident to a state of war should cease. The ratifications of the agreement were to be exchanged at the Department of State within four months, though a delay might be granted to a government unable to make the exchange within that term. But the proceedings for the exchange of ratifications were not to interfere with "the continuation of the conferences designed for the negotiation of a peace." It was declared that the Secretary of State signed the articles "in the character of mediator."<sup>1</sup>

October 10, 1871, Messrs. Godoy and Freyre, respectively representing Chile and Bolivia, made a written request for a three months' extension of the time for the exchange of the ratifications for those governments, and Mr. Freyre asked for a fifteen months' extension for Peru. Ecuador's ratifications bear date June 17, 1871.

December 20, 1871, Messrs. Freyre, Godoy, Flores, and Lopez Roberts met with Mr. Fish, at the latter's invitation, in the Department of State, with a view to negotiate for a definitive peace. Mr. Godoy requested the adjournment of the conference till some day subsequent to the arrival of the next mail from South America, on account of his having recently received information from his government of the sending of its ratification of the armistice, together with certain instructions. All present having agreed to such an adjournment, the Secretary of State proposed that the next meeting should take place January 10, 1872, and this proposal was accepted.

The conference reassembled January 24, 1872, but adjourned on the same day, having failed to conclude a peace, owing to the question as to the bombardment of Valparaiso. The following protocol was drawn up and signed:

"Protocol of a conference held at the Department of State at Washington, on the 24th of January, 1872, between the Secretary of State, the Spanish minister, and the ministers of the allied republics of South America.

"Present: Mr. Hamilton Fish, Secretary of State of the United States; Don Joaquin Godoy, envoy extraordinary and minister plenipotentiary of Chili; Don Manuel Freyre, plenipotentiary of Bolivia; Don Antonio Flores, plenipotentiary of Ecuador; Don Manuel Freyre, envoy extraordinary and minister plenipotentiary of Peru; Don Mauricio Lopez Roberts, envoy extraordinary and minister plenipotentiary of Spain.

"The conference having been opened by the Secretary of State, and before the business for which the conference had been convoked had come

<sup>1</sup> For. Rel. 1871, 775.



under consideration, the minister of Chile asked permission to request that it should be stated in the protocol of the conference that the indefinite armistice or truce concluded on the 11th of April 1871, between the plenipotentiaries of the allied republics of the Pacific and the plenipotentiary of Spain, in no wise implied the reestablishment of commercial relations between Spain and the aforesaid republics. All the undersigned concurring, it was agreed that, in testimony thereof, this incident should be mentioned in the present protocol.

"The Secretary of State then expressed the hope of his Government that, now that the armistice had been signed by all the powers, and the ratifications thereof been duly exchanged between Spain and three of the republics, that the representatives of the several powers would find themselves prepared to proceed to the reduction into form and the signing of a definitive treaty of permanent peace.

"The plenipotentiaries then proceeded, at the suggestion of the Secretary of State, to discuss the means of concluding a definitive peace between Spain and the allied republics, which was the special object of this meeting.

"The minister of Spain said :

"My government is animated by an ardent desire to put an end to the interruption of its relations with the allied republics of the Pacific. A definitively concluded peace, such as completely to obliterate our differences, and tending not only to draw closer the bonds of friendship and good understanding, but to consolidate them by means of treaties promoting our intellectual and commercial interests, is the great desire of my government, for which reason it accepted, with the greatest pleasure and with the most sincere purpose, the good offices of the Washington cabinet."

"The minister of Chile replied as follows :

"The statement of the desires which animate the Government of Spain, as regards the restoration of peace with the allied republics of the Pacific, just made by the minister of that monarchy, affords me much pleasure. Chile, whose foreign and domestic policy is, and ever has been, characterized by a sincere adhesion to peace and conciliation, also desires that, without prejudice to just claims, the state of war between the republics of the Pacific and Spain may cease. A definitive peace would therefore be the termination of this negotiation opened by the friendly solicitude of the Washington cabinet, if the government of His Catholic Majesty should be disposed to remove the obstacle which exists by making reparation to that of Chile for the bombardment of Valparaiso. I scarcely need say, because it is notorious, that that act, committed by the naval forces of Spain against an exclusively commercial place, without any defenses, offended the dignity and injured the interests of Chile in such a manner that to forget it unconditionally would be inconsistent with the just rights of the offended nation. The nature of the acts of reparation required is sufficiently well determined by that of the injuries committed, and I will therefore specify them, if the minister of Spain can inform me that his government is willing to make the just settlement which that of Chile requires as a condition for the conclusion of a peace."

"The minister of Spain replied :

"I regret that, notwithstanding the earnest wishes of the Government

of Spain for the conclusion of a definitive peace, and one which may conduce not only to the renewal, but also to the consolidation, of the friendly relations which before the war united it to the allied republics of the Pacific, it is impossible for it to accept, on a basis proposed by the minister of Chile, a discussion which at the present time could lead to no beneficial result. I hope that, nevertheless, nothing will prevent the conclusion of a definitive peace, which will obliterate the last differences and satisfy the generous hopes of the nations interested in the conclusion of such a peace.'

"The minister of Chile rejoined:

"Since Spain, as has just been stated by her plenipotentiary, is not disposed to make reparation to Chile for the injury done her by the bombardment of Valparaiso, which Chile considers a necessary condition of durable peace, I must say that my cooperation is impossible, and that, notwithstanding the generous efforts of the mediator and the readiness with which Chile has sought to respond thereto, the existing status of Chile toward Spain will continue.

"This being the situation, I do not, for my part, consider the continuance of this negotiation as likely to lead to any satisfactory result. Before the suspension of the conferences, however, I must here give expression in the name of the Government and people of Chile to their gratitude toward the Government of the United States and its honorable representatives in these conferences for their earnest efforts in behalf of a common agreement.'

"The minister of Peru said:

"The Peruvian nation, actuated by the most friendly sentiments, and thinking that the time had arrived for the termination, by means of a frank and sincere reconciliation, of the differences which recently arose between the allied republics of the Pacific and Spain, hastened to accept the friendly mediation of the United States, and to enter into arrangements with its allies, not only for the negotiation of an unlimited armistice, but to the end that a peace might be made in common, as solid and durable as should be maintained by countries having the same language, origin, and customs.

"The Government of Peru did not for a moment doubt that the obstacles which had prevented the realization of peace would be easily removed after the time which had elapsed, and when a means of reparation could be devised which would be satisfactory to the dignity and the interests of the belligerents. In the course of the conferences which were confidentially held after the signing of the truce the effort was made to settle the question of the bombardment of Valparaiso by all possible means; but, all efforts having been thus far unavailing, we are obliged to enter the official path of negotiation, where, as was to be expected, we meet with the same obstacle, as is seen by the remarks which have just been made by the plenipotentiary of Chile and the minister of Spain. For this reason I must accept the opinion of the minister of Chile with regard to the termination of this negotiation, and admit that, for the present at least, we must renounce the hope of concluding a collective peace with the Spanish nation, the Republic of Peru meanwhile remaining in the state of indefinite truce negotiated on the 11th of April 1871, through the esteemed

mediation of the Government of the United States, and with the justified and solicitous intervention of its representative in those conferences.'

"Mr. Freyre concluded by saying that, as the representative of Bolivia, he did not hesitate to make the same assertions.

"The minister of Ecuador said:

"My government, like that of Peru, entertained, and still entertains, the hope of a definitive peace. Thus it was that on accepting the mediation of the United States in the Lima protocol of September 1, 1868, the envoy extraordinary and minister plenipotentiary of Ecuador (the speaker) based his preference for that mediation on the ground that it opened the door to the restoration of peace, while the good offices tendered by France and England were limited to the conclusion of an armistice. Thus, the Government of Ecuador would have been glad to concur in a collective peace which should draw the veil of oblivion over the past disagreements and seal the reconciliation of nations bound to each other by the ties of blood. Be this as it may, a sister nation, to which Ecuador is united by the closest and most indestructible bonds, not having obtained the reparation without which its government has thought, with the rectitude and sincerity which are characteristic of it, that peace would not be acceptable to the nation and would offer no guarantee for the future, I must necessarily confine myself, like the other representatives of the alliance of the Pacific, to the truce concluded in common. I feel confident, however, that the conciliatory desires manifested by the governments interested will not be unproductive of good hereafter, and that, always favored by the good offices of the Washington Cabinet, the lofty design which dictated them, and on the accomplishment of which so many hopes depended, will at length be realized. Meanwhile I gladly perform the duty of expressing, in the name of my government, its warmest thanks to the Government of the United States for the noble initiative taken by it, as likewise to the honorable Secretary of State for his generous efforts and for his unvarying kindness and courtesy throughout the course of these prolonged negotiations.'

"The Secretary of State said that he was not only disappointed, but deplored that the difference between Spain and Chile seemed to be so difficult of reconciliation. The United States hoped that, in view of the great changes which have taken place in the executive government of Spain since the act of which Chile complains, His Majesty the present sovereign of Spain might not be held morally accountable for the severe act of his predecessor in the assault on Valparaiso, but might satisfy the natural sensitiveness of Chile by expressing regret that the government of Isabel II. had omitted to offer to Chile satisfactory explanations on that subject.

"It is presumed, also, that under existing circumstances the allied republics of the Pacific, having unconditionally accepted the mediation of the United States subsequently to the conferences at Lima, the protocol of which bears date the 1st of September 1868, and having, pursuant to that mediation, entered into an armistice with their adversary and made an earnest, but thus far unfortunately unsuccessful, effort toward jointly concluding a definitive peace, may now at least take into serious consideration the expediency of framing separate treaties with Spain. If a

disposition for that purpose should at any time be entertained, and the further good offices of the United States be supposed to be useful toward its accomplishment, they will, if desired, be cheerfully bestowed.

"HAMILTON FISH,

"*Secretary of State.*

"JOAQUIN GODOY,

"*Plenipotenciario de Chile.*

"MAN'L FREYRE,

"*Plenipotenciario de Bolivia.*

"ANTONIO FLORES,

"*Plenipotenciario del Ecuador.*

"MAN'L FREYRE,

"*Plenipotenciario del Peru.*

"MAURICIO LOPEZ ROBERTS,

"*Plenipotenciario de Spana.*"

Separate treaties of peace between Spain and the allied republics were after long delay signed and ratified, the earliest concluded being those with Peru and Bolivia.<sup>1</sup>

#### 4. PLANS FOR PERMANENT ARBITRATION.

We have already referred to various plans for the establishment of a permanent system of arbitration.<sup>2</sup> By Article LXIII. of the final act of the Congress of Vienna the States of the Germanic Confederation engaged "not to make war against each other on any pretext, nor to pursue their differences by force of arms, but to submit them to the Diet," which would "attempt a mediation by means of a commission;" but it was stipulated that "if this should not succeed, and a juridical sentence becomes necessary, recourse shall be had to a well-organized *Austregal* court (*Austrägalinstanz*), to the decision of which the contending parties are to submit without appeal."

By a decree of the Diet, made at Frankfort October 30, 1834, provision was made for the establishment of an arbitral tribunal, for the purpose of deciding upon any differences arising between the States as to the interpretation of the constitution of the confederation, or as to the limits of the cooperation accorded to the States in the execution of certain determinate rights of sovereignty. Each of the seventeen members of the ordinary assembly of the Diet was to name every three years, from the State which he represented, two eminent men, one from the judicial and the other from the administrative branch of government; and from the thirty-four persons so named as arbitrators, arbitral judges, not to exceed

<sup>1</sup> Mr. Mendez de Vigo to Mr. Evarts, September 12, 1879; Mr. Evarts to Mr. Mendez de Vigo, September 19, 1879; Mr. E. de Murnaga to Mr. Bayard, July 19, 1886; Mr. Bayard to Mr. de Murnaga, July 31, 1886; MS. notes to and from the Spanish legation.

<sup>2</sup> *Supra*, I. 962; II. 2109. Various historical bodies, such as the Amphictyonic Council, the Supreme Court of the United States, and the German Supreme Court at Leipzig, are often referred to as arbitral tribunals. We desire merely to call attention to the fact, without entering into the question of diversities or analogies. See Calvo, *Le Droit Int.* 4th ed. III. 491.

eight in number, and an umpire, were to be chosen, in a prescribed manner, for the decision of each difference as it might arise.<sup>1</sup>

September 3, 1880, representatives of Chile and Colombia signed at Bogotá a convention providing for the submission of all differences that should arise between them to the arbitration of the President of the United States, unless another arbitrator should be specially agreed upon, and for the adoption of measures looking to the conclusion of similar conventions with the other American nations.<sup>2</sup> December 24, 1880, a similar convention was signed at Paris by representatives of Colombia and Salvador, with a stipulation suggesting the convocation of a congress of American nations at Panama. The ratifications of this convention were exchanged at Paris January 7, 1882. It was officially proclaimed in Colombia May 23, 1882, and in Salvador April 9, 1883.<sup>3</sup> By Article V. of a protocol of a semi-official conference of representatives of the Argentine Republic, Bolivia, Colombia, the Dominican Republic, Ecuador, Mexico, Peru, Salvador, and Venezuela at Caracas August 14, 1883, it was declared that, in view of "the feeling of brotherhood which ought to preside over the international relations" of the Spanish-American republics, they should, "in order to render collisions with arms impossible, consider themselves under the obligation to establish arbitration as the only solution for every controversy concerning their rights and interests respecting which differences might occur."<sup>4</sup>

In numerous recent treaties a clause has been inserted for the arbitration of any disputes which may arise as to their interpretation or execution. Such a clause was introduced in various treaties between Italy and other powers when Mr. Mancini was minister for foreign affairs of the former. Thus a protocol of June 15, 1883, annexed to the treaty of commerce of that day between Italy and Great Britain, signed on the part of the former by Mr. Mancini, provides: "Any controversies which may arise respecting the interpretation or the execution of the present treaty, or the consequences of any violation thereof, shall be submitted, when the means of settling them directly by amicable agreement are exhausted, to the decision of commissioners of arbitration, and the result of such arbitration shall be binding upon both governments." Provision was also made for the appointment of commissioners.<sup>5</sup>

A similar protocol was annexed to the treaty of commerce between Great Britain and Greece of November 10, 1886.<sup>6</sup>

A clause to the same effect is embodied in Article XX. of the treaty of commerce and navigation between Belgium and Denmark of June 18, 1895.

By a treaty between Spain and Peru, signed at Lima July 16, 1897, it is stipulated that any questions arising between the two countries shall be

<sup>1</sup> Br. and For. State Papers, XXIII. 1191.

<sup>2</sup> For. Rel. 1880, 331; 1881, 3-6, 114, 122, 350.

<sup>3</sup> For. Rel. 1883, 236-237. The signer of this convention on the part of Salvador was Señor Torres-Caicedo.

<sup>4</sup> Br. and For. State Papers, LXXIV. (1882-1883) 895.

<sup>5</sup> Br. and For. State Papers, LXXIV. 75.

<sup>6</sup> Br. and For. State Papers, LXXVII. 106. An arbitral clause may be found in a treaty between Spain and Sweden and Norway, *Id.* LXXVIII. 843.

submitted to arbitration, and, in case the contracting parties should be unable to settle any question in that manner, to the mediation of a friendly power.<sup>1</sup>

**Rules proposed by the Institute of International Law.**—The subject of rules for the regulation of the procedure of international tribunals of arbitration was discussed by the Institute of International Law at its session at Geneva in 1874, and at its session at the Hague in 1875. At the latter session provisional rules were adopted. The members and associates of the institute present on this occasion were M. Asser, counselor to the ministry of foreign affairs of the Netherlands and professor of law at Amsterdam; the Right Hon. Mountague Bernard, of Oxford; M. Besobrasoff, member of the Academy of Sciences, St. Petersburg; Bluntschli, of the University of Heidelberg; Professor Brocher, of the University of Geneva; Dr. von Bulmerincq, a privy counselor and professor at the University of Heidelberg; David Dudley Field, of New York; W. E. Hall, of London; M. de Martens, of the University of St. Petersburg; M. Moynier, of Geneva; Baron Neumann, professor at the University of Vienna, member of the Chamber of Peers; M. de Parieu, member of the Senate of France and of the Institute of France; M. Pierantoni, professor at the University of Rome, senator of the Kingdom of Italy; M. Rivier, professor at the University of Brussels; M. Rolin-Jaequemyns, of Ghent; M. Albéric Rolin, of Ghent; Sir Travers Twiss, of London, and Mr. Westlake, of London. The rules adopted were as follows:

"The Institute, desiring that recourse to arbitration for the settlement of international difficulties should be practised more and more by civilized peoples, hopes to contribute toward the realization of this end by proposing for courts of arbitration the following provisional rules of procedure. It recommends them for adoption, in whole or in part, by states that may conclude agreements to arbitrate.

"ART. 1. The agreement to arbitrate is concluded by a valid international treaty.

"It may be so concluded:

"(a) *By anticipation*, whether for any and every difference, or for those of a certain class specially to be designated, that may arise between the contracting states;

"(b) For one or more differences *already existing*.

"ART. 2. The agreement to arbitrate gives to each of the contracting parties the right to appeal to the tribunal of arbitration which it designates for the decision of the question in dispute. If the agreement to arbitrate does not designate the number and names of the arbitrators, the tribunal of arbitration shall proceed according to the provisions laid down in the agreement to arbitrate or in some other agreement.

"If there be no such provisions, each of the contracting parties shall choose an arbitrator, and the two arbitrators thus appointed shall choose a third arbitrator or name a third person who shall appoint him.

"If the two arbitrators appointed by the parties cannot agree on the choice of a third arbitrator, or if one of the parties refuses the cooperation which, according to the agreement to arbitrate, he should give to the

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<sup>1</sup> Mr. Neill to Mr. Sherman, July 24, 1897, MS. dispatches from Peru.

formation of the court of arbitration, or if the person named refuses to choose, the agreement to arbitrate is annulled.

"ART. 3. If in the first instance, or because they have not been able to agree on the choice of arbitrators, the contracting parties have agreed that the tribunal of arbitration should be formed by a third person named by them, and if the person named undertakes the formation of the tribunal, the course to be followed shall depend, first, on the provisions of the agreement to arbitrate. If there be no such provisions, then the third person so named may either himself appoint the arbitrators or propose a certain number of persons, among whom each of the parties shall choose.

"ART. 4. The following shall be eligible for appointment as international arbitrators: Sovereigns and heads of governments, without any restriction, and all persons who are competent according to the law of their country to exercise the functions of arbitrator.

"ART. 5. If the parties have agreed upon individual arbitrators, the incompetency of or the allegation of a valid objection to one of such arbitrators invalidates the whole agreement to arbitrate, unless the parties can agree upon another competent arbitrator.

"If the agreement to arbitrate does not prescribe the manner of selecting another arbitrator in case of incompetency or of the allegation of a valid objection, the method prescribed for the original choice must again be followed.

"ART. 6. The acceptance of the office of arbitrator must be in writing.

"ART. 7. If an arbitrator refuses the office, or if he resigns after having accepted it, or if he dies or becomes mentally incompetent, or if he is validly challenged on account of inability to serve according to the terms of art. 4, then the provisions of art. 5 shall be in force.

"ART. 8. If the seat of the tribunal of arbitration is not named either by the agreement to arbitrate or by a subsequent agreement of the parties, it shall be named by the arbitrator or by a majority of the arbitrators.

"The tribunal of arbitration is authorized to change the place of its sessions only in case the performance of its duties at the place agreed upon is impossible or manifestly dangerous.

"ART. 9. The tribunal of arbitration, if composed of several members, chooses a president from among its own number and appoints one or more secretaries.

"The tribunal of arbitration decides in what language or languages its deliberations and the pleadings of the litigants shall be conducted and the documents and other evidence be presented. It keeps minutes of its sessions.

"ART. 10. The tribunal of arbitration sits with all its members present. It may, however, delegate one or more of its members or even commission outside persons to draw up certain preliminary proceedings.

"If the arbitrator is a state or its head, a commune or other corporation, an authority, a faculty of law, a learned society, or the actual president of the commune, corporation, authority, faculty, or society, all the pleadings may be conducted, with the consent of the parties, before a commissioner appointed *ad hoc* by the arbitrator. A protocol of such pleadings shall be kept.

"ART. 11. No arbitrator can without the consent of the litigants name a substitute for himself.

"ART. 12. If the agreement to arbitrate or a subsequent agreement of the parties prescribes the method of procedure to be followed by the court of arbitration or prescribes to it the observance of a definite and positive law of procedure, the tribunal of arbitration must conform thereto. If there be no such provision, the procedure to be followed shall be freely prescribed by the tribunal of arbitration, which is in such case required to conform only to the rules which it has informed the parties it would observe.

"The control of the discussions belongs to the president of the tribunal.

"ART. 13. Each of the parties may appoint one or more persons to represent it before the tribunal.

"ART. 14. Exceptions based on the incompetency of the arbitrators must be taken before any others. In case of the silence of the parties any later contestation is excluded, except for cases of incompetency that have subsequently supervened.

"The arbitrators must pronounce upon the exceptions taken to the incompetency of the court of arbitration (subject to the appeal referred to in the next paragraph) and must pronounce in accordance with the provisions of the agreement to arbitrate.

"There shall be no appeal from the preliminary judgments on the question of competency, except in connection with the appeal from the final judgment in the arbitration.

"In case the doubt on the question of competency depends upon the interpretation of a clause of the agreement to arbitrate, the parties are deemed to have given to the arbitrators full power to settle the question, unless there be a clause to the contrary.

"ART. 15. Unless there be provisions to the contrary in the agreement to arbitrate, the tribunal of arbitration has the right—

"1. To determine the forms, and the periods of time, in which each litigant must, by his duly authorized representatives, present his conclusions, support them in fact and in law, lay his proofs before the tribunal, communicate them to his opponent, and produce the documents the production of which his opponent demands.

"2. To consider as conceded the claims of each party which are not plainly contested by his opponent, as for instance the alleged contents of documents which the opponent, without sufficient reason, fails to produce.

"3. To order new hearings of the parties, and to demand from each of them the clearing up of doubtful points.

"4. To make rules of procedure (for the conduct of the case), to compel the production of evidence, and, if necessary, to require of a competent court the performance of judicial acts which the tribunal of arbitration is not qualified to perform, notably the swearing of experts and of witnesses.

"5. To decide with its own free judgment on the interpretation of the documents produced, and in general on the merits of the evidence presented by the litigants.

"The forms and the periods of time, mentioned in clauses 1 and 2 of the present article shall be determined by the arbitrators by a preliminary order.



"ART. 16. Neither the parties nor the arbitrators can officially implead other states or third persons without the special and express authorization of the agreement to arbitrate and the previous consent of such third parties.

"The voluntary intervention of a third party can be allowed only with the consent of the parties who originally concluded the agreement to arbitrate.

"ART. 17. Cross-actions can be brought before the tribunal of arbitration only so far as they are provided for by the original agreement to arbitrate, or as the parties and the tribunal may agree to allow them.

"ART. 18. The tribunal of arbitration decides in accordance with the principles of international law, unless the agreement to arbitrate prescribes different rules or leaves the decision to the free judgment of the arbitrators.

"ART. 19. The tribunal of arbitration cannot refuse to pronounce judgment on the pretext that it is insufficiently informed either as to the facts or as to the legal principles to be applied.

"It must decide finally each of the points at issue. If, however, the agreement to arbitrate does not require a final decision to be given simultaneously on all the points, the tribunal may, while deciding finally on certain points, reserve others for subsequent disposition.

"The tribunal of arbitration may render interlocutory or preliminary judgments.

"ART. 20. The final decision must be pronounced within the period of time fixed by the agreement to arbitrate or by a subsequent agreement. If there be no other provision a period of two years from the day of the conclusion of the agreement to arbitrate is to be considered as agreed on. The day of the conclusion of the agreement is not included, nor the time during which one or more arbitrators have been prevented, by *force majeure*, from fulfilling their duties.

"In case the arbitrators, by interlocutory judgments, order preliminary proceedings, the period is to be extended for a year.

"ART. 21. Every judgment, final or provisional, shall be determined by a majority of all the arbitrators appointed, even in case one or more of them should refuse to concur in it.

"ART. 22. If the tribunal of arbitration finds the claims of neither of the parties justified it shall so declare and, unless limited in this respect by the agreement to arbitrate, shall determine the true state of the law with regard to the parties to the dispute.

"ART. 23. The arbitral sentence must be drawn up in writing and contain an exposition of the grounds of the decision, unless exemption from this be stipulated in the agreement to arbitrate. It must be signed by each of the members of the court of arbitration. If a minority refuse to sign it the signature of the majority is sufficient, with a written statement that the minority refuse to sign.

"ART. 24. The sentence, together with the grounds, if an exposition of them be given, is formally communicated to each party. This is done by communicating a certified copy to the representative of each party, or to its attorney appointed *ad hoc*.

"After the sentence has been communicated to the representative or attorney of one of the parties it cannot be changed by the tribunal of arbitration.

"Nevertheless, the tribunal has the right, so long as the time limits of the agreement to arbitrate have not expired, to correct errors in writing or in reckoning, even though neither of the parties should suggest it, and to complete the sentence on points at issue not decided, on the suggestion of one of the parties, and after giving the other party a hearing. An interpretation of the sentence is allowable only on demand of both parties.

"ART. 25. The sentence duly pronounced decides, within the scope of its operation, the point at issue between the parties.

"ART. 26. Each party shall bear its own costs and half of the costs of the tribunal of arbitration, without prejudice to the decision of the court as to the indemnity that one or the other party may be condemned to pay.

"ART. 27. The sentence of arbitration shall be void in case of the avoidance of the agreement to arbitrate, or of an excess of power, or of proved corruption of one of the arbitrators, or of essential error."

**Rules proposed at the Columbian Exhibition in 1893.**—"Proposed rules for the organization of an international tribunal of arbitration, submitted by Messrs. Wm. Allen Butler, Dorman B. Eaton, and Cephas Brainerd to the Universal Peace Congress in Chicago in 1893.

"In order to maintain peace between the high contracting parties, they agree as follows:

"First. If any cause of complaint arise between any of the nations parties hereto, the one aggrieved shall give formal notice thereof to the other, specifying in detail the cause of complaint and the redress which it seeks.

"Second. The nation which receives from another notice of any cause of complaint shall, within one month thereafter, give a full and explicit answer thereto.

"Third. If the nation complaining and the nation complained of do not otherwise, within two months after such answer, agree between themselves, they shall each appoint three members of a joint commission, who shall confer together, discuss the differences, endeavor to reconcile them, and within one month after their appointment shall report the result to the nations appointing them respectively.

"Fourth. If the joint commissioners fail to agree, or the nations appointing them fail to ratify their acts, those nations shall, within twelve months after the appointment of the joint commission, give notice of such failure to the other parties to the treaty, and the cause of complaint shall be referred to the tribunal of arbitration, instituted as follows:

"1. Each signatory nation shall, within one month after the ratification of this treaty, transmit to the other signatory nations the names of four persons as fit to serve on such tribunal.

"2. From the list of such persons, the nations at any time in controversy shall alternately, and as speedily as possible, select one after another until seven are selected, which seven shall constitute the tribunal for the hearing and decision of that controversy. Notice of each selection shall immediately be given to the permanent secretary, who shall at once notify the person so selected.

"3. The tribunal thus constituted shall, by writing signed by the members or a majority of them, appoint a time and place of meeting and give notice thereof through the permanent secretary to the parties in controversy; and at such time and place, or at other times and places to which an adjournment may be had, it shall hear the parties and decide between them, and such decision shall be final and conclusive.

"4. If either of these parties fail to signify its selection of names from the lists within one month after a request from the other to do so, the other may select for it; and if any of the persons selected to constitute the tribunal shall die or fail from any cause to serve, the vacancy shall be filled by the nation which originally named the person whose place is to be filled.

"Fifth. Each of the parties to this treaty binds itself to unite, as herein prescribed, in forming a tribunal of arbitration for all cases in controversy between any of them not adjusted by a joint commission, as hereinbefore provided, except that such arbitration shall not extend to any question respecting the independence or sovereignty of a nation, or its equality with other nations, or its form of government or its internal affairs.

"1. The Tribunal of Arbitration shall consist of seven members, and shall be constituted in a manner provided in the foregoing fourth rule; but it may, if the nations in controversy so agree, consist of less than seven persons, and in that case the members of the tribunal shall be selected jointly by them from the whole list of persons named by the signatory nations. Each nation claiming a distinct interest in the question at issue shall have the right to appoint one additional arbitrator on its own behalf.

"2. When the tribunal shall consist of several arbitrators a majority of the whole number may act, notwithstanding the absence or withdrawal of the minority. In such case the majority shall continue in the performance of their duties until they shall have reached a final determination of the question submitted for their consideration.

"3. The decision of a majority of the whole number of arbitrators shall be final, both on the main and incidental issues, unless it shall have been expressly provided by the nations in controversy that unanimity is essential.

"4. The expenses of an arbitration proceeding, including the compensation of the arbitrators, shall be paid in equal proportions by the nations that are parties thereto, except as provided in subdivision 6 of this article; but expenses of either party in the preparation and prosecution of its case shall be defrayed by it individually.

"5. Only by the mutual consent of all the signatory nations may the provisions of these articles be disregarded and courts of arbitration appointed under different arrangements.

"6. A permanent secretary shall be appointed by agreement between the signatory nations, whose office shall be at Berne, Switzerland, where the records of the tribunal shall be preserved. The permanent secretary shall have power to appoint two assistant secretaries, and such other assistants as may be required for the performance of the duties incident to the proceedings of the tribunal.

"The salary of the permanent secretary, assistant secretaries, and other persons connected with his office shall be paid by the signatory nations,

out of a fund to be provided for that purpose, to which each of such nations shall contribute in a proportion corresponding to the population of the several nations.

"7. Upon the reference of any controversy to the tribunal, and after the selection of the arbitrators to constitute the tribunal for the hearing of such controversy, it shall fix the time within which the case, counter case, reply, evidence, and arguments of the respective parties shall be submitted to it, and shall make rules regulating the proceedings under which that controversy shall be heard.

"8. The tribunal as first constituted, for the determination of a controversy, may establish general rules for practice and proceeding before all tribunals assembled for the hearing of any controversy submitted under the provisions of these articles, which rules may from time to time be amended or changed by any subsequent tribunal; and all such rules shall immediately, upon their adoption, be notified to the various signatory powers.

"Sixth. If any of the parties to this treaty shall begin hostilities against another party without having first exhausted the means of reconciliation herein provided for, or shall fail to comply with the decisions of the Tribunal of Arbitration, within one month after receiving notice of the decision, the chief executive of every other nation party hereto shall issue a proclamation declaring [such] hostilities or failure to be an infraction of this treaty, and at the end of thirty days thereafter the ports of the nations from which the proclamation proceeds shall be closed against the offending or defaulting nation, except upon condition that all vessels and goods coming from or belonging to any of its citizens shall, as a condition, be subjected to double the duties to which they would otherwise have been subjected. But the exclusion may be at any time revoked by another proclamation of like authority, issued at the request of the offending nation, declaring its readiness to comply with this treaty in its letter and spirit.

"Seventh. A conference of representatives of the nations parties to this treaty shall be held every alternate year, beginning on the first of January, at the capital of each in rotation, and in the order of the signatures to this treaty, for the purpose of discussing the provisions of the treaty, and desired amendments thereof, averting war, facilitating intercourse, and preserving peace."

Resolution adopted by the interparliamentary conference at Brussels, in 1895, concerning the establishment of a permanent court of international arbitration.—In 1889 certain members of the British and French parliaments formed at Paris a parliamentary union, to be composed of members of the legislative assemblies of various countries, for the purpose of considering questions relating to the preservation of peace, and especially to the development of international arbitration. This association has, each year since its formation, held a conference at some city in Europe. At its session at Brussels, in 1895, it adopted the following resolution concerning the establishment of a permanent court of international arbitration:

"The interparliamentary conference, assembled at Brussels, considering the frequency of cases of international arbitration and the number and extension of arbitral clauses in treaties, and desiring to see an international justice and an international jurisdiction established on a stable

basis, charges its president to recommend to the favorable consideration of the governments of civilized states the following provisions, which may be made the subject of a diplomatic conference or of special conventions:

"1. The high contracting parties constitute a permanent court of international arbitration, to take cognizance of differences which they shall submit to its decision.

"In cases in which a difference shall arise between two or more of them the parties shall decide whether the contest is of a nature to be brought before the court under the obligations which they have contracted by treaty.

"2. The court shall sit at —.

"Its seat may be transferred to another place by the decision of a majority of three-fourths of the adhering powers.

"The government of the state in which the court is sitting guarantees its safety as well as the freedom of its discussions and decisions.

"3. Each signatory or adhering government shall name two members of the court.

"Nevertheless, two or more governments may unite in designating two members in common.

"The members of the court shall be appointed for a period of five years, and their powers may be renewed.

"4. The support and compensation of the members of the court shall be defrayed by the state which names them.

"The expenses of the court shall be shared equally by the adhering states.

"5. The court shall elect from its members a president and a vice-president for a period of a year. The president is not eligible for reelection after a period of five years. The vice-president shall take the place of the president in all cases in which the latter is unable to act.

"The court shall appoint its clerk and determine the number of employees which it deems necessary.

"The clerk shall reside at the seat of the court and have charge of its archives.

"6. The parties may, by common accord, lay their suit directly before the court.

"7. The court is invested with jurisdiction by means of a notification given to the clerk, by the parties, of their intention to submit their difference to the court.

"The clerk shall bring the notification at once to the knowledge of the president.

"If the parties have not availed themselves of their privilege of bringing their suit directly before the court, the president shall designate two members who shall constitute a tribunal to act in the first instance.

"On the request of one of the parties, the members called to constitute this tribunal shall be designated by the court itself.

"The members named by the states that are parties to the suit shall not be a part of the tribunal.

"The members designated to sit cannot refuse to do so.

"8. The form of the submission shall be determined by the disputing governments, and, in case they are unable to agree by the tribunal, or, when there is occasion for it, by the court.

"There may also be formulated a counter case.

"9. The judgment shall disclose the reasons on which it is based, and it shall be pronounced within a period of two months after the closure of the discussions. It shall be notified to the parties by the clerk.

"10. Each party has the right to interpose an appeal within three months after the notification of the judgment.

"The appeal shall be brought before the court. The members named by the states concerned in the litigation, and those who formed part of the tribunal, cannot sit in the appeal.

"The case shall proceed as in the first instance. The judgment of the court shall be definitive. It shall not be attacked by any means whatsoever.

"11. The execution of the decisions of the court is committed to the honor and good faith of the litigating states.

"The court shall make a proper application of the agreements of parties who, in an arbitration, have given it the means of attaching a pacific sanction to its decisions.

"12. The nominations prescribed by article 3 shall be made within six months from the exchange of the ratifications of the convention. They shall be brought by diplomatic channels to the knowledge of the adhering powers.

"The court shall assemble and fully organize one month after the expiration of that period, whatever may be the number of its members. It shall proceed to the election of a president, of a vice-president, and of a clerk, as well as to the formulation of rules for its interior regulation.

"13. The contracting parties shall formulate the organic law of the court. It shall be an integral part of the convention.

"14. States which have not taken part in the convention may adhere to it in the ordinary way.

"Their adhesion shall be notified to the government of the country in which the court sits, and by that to the other adhering governments."

**Proposal of the New York State Bar Association.**—The Bar Association of the State of New York, at its annual session held in Albany January 22, 1896, appointed a committee to consider the subject of international arbitration and to prepare a plan for a tribunal between Great Britain and the United States. The committee referred the matter to a subcommittee, which reported a plan for a more comprehensive tribunal than was at first contemplated. This plan was approved by the full committee, and afterwards, at a special meeting held in Albany April 16, 1896, was adopted by the association. It was as follows:

"First. The establishment of a permanent international tribunal, to be known as 'The International Court of Arbitration.'

"Second. Such court to be composed of nine members, one each from nine independent states or nations, such representative to be a member of the supreme or highest court of the nation he shall represent, chosen by a majority vote of his associates because of his high character as a publicist and judge and his recognized ability and irreproachable integrity. Each judge thus selected to hold office during life or the will of the court selecting him.

"Third. The court thus constituted to make its own rules of procedure, to have power to fix its place of sessions, and to change the same from

time to time as circumstances and the convenience of litigants may suggest, and to appoint such clerks and attendants as the court may require.

"Fourth. Controverted questions arising between any two or more independent powers, whether represented in said 'International Court of Arbitration' or not, at the option of said powers to be submitted by treaty between said powers to said court, providing only that said treaty shall contain a stipulation to the effect that all parties thereto shall respect and abide by the rules and regulations of said court and conform to whatever determination it shall make of said controversy.

"Fifth. Said court to be opened at all times for the filing of cases and counter cases under treaty stipulations by any nation, whether represented in the court or not, and such orderly proceedings in the interim between sessions of the court, in preparation for argument and submission of the controversy, as may seem necessary, to be taken as the rules of the court provide for and may be agreed upon between the litigants.

"Sixth. Independent powers not represented in said court, but which may have become parties litigant in a controversy before it, and by treaty stipulation have agreed to submit to its adjudication, to comply with the rules of the court, and to contribute such stipulated amount to its expenses as may be provided for by its rules or determined by the court."

This plan was embodied in a petition which was duly presented to the President of the United States. In this petition a recommendation was made to the effect that negotiations be opened with Great Britain, France, Germany, Russia, the Netherlands, Mexico, Brazil, and the Argentine Republic, with a view to the establishment of such a tribunal as that suggested.

**Additional Notes: Bering Sea Damage Commission.**—The awards of this commission, amounting to \$473,151.26, is printed at page 2131 of volume 2 of this work. By an act approved June 15, 1898, Congress made an appropriation to pay the sums awarded, at the same time declaring: "This appropriation is made without the admission that any liability exists for any loss of prospective profits to British vessels engaged in pelagic fur sealing; or for interest on the sums awarded to Great Britain, and without admitting the authority of the arbitrators to make any award on the basis of damages for the arrest or detention of vessels not included in the submission contained in the treaty." The money was paid by the Secretary of State of the United States to the British ambassador at Washington on June 16, 1898, the ambassador giving the following receipt:

"JUNE 16, 1898.

"\$473,151.26.

"Received of the Secretary of State of the United States the sum of four hundred seventy-three thousand one hundred fifty-one 26/100 (\$473,151.26) dollars, in full of the amount awarded by the commissioners appointed pursuant to the stipulations of the convention of February 8, 1896, between the United States and Great Britain, providing for the settlement of the claims presented by the latter against the former in virtue of the convention of February 29, 1892, also in full payment of the damages, which, by agreement between the Secretary of State and Her Britannic Majesty's ambassador at Washington, were determined by said commission and were found and assessed in favor of the following claimants, to wit: James

Gaudin, master of the *Ada*, for claim arising in 1887, and the claimant of the *Black Diamond* for claim arising in 1886, the above payments being made in accordance with an act of appropriation approved June 15, 1898, entitled, 'An act making an appropriation to pay the Bering Sea awards.'

"(Signed)

JULIAN PAUNCEFOTE."

**The Cheek Case.**—At page 1899 of volume 2 of this work, an account is given of the claim of Dr. Cheek against Siam, upon which an award was made by Sir Nicholas Hannen on March 21, 1898. The award was as follows:

"Whereas by an agreement dated the 6th day of July 1897 between His Royal Highness Prince Devawongse Varoprakar, minister for foreign affairs of His Majesty the King of Siam, and John Barrett, minister resident and consul general of the United States of America, it was agreed to refer every matter of dispute, both facts and law, brought into issue between the Siamese Government and the estate of the late Marion A. Cheek to the decision of me, Sir Nicholas John Hannen, knight, chief justice of Her Britannic Majesty's supreme court for China and Japan; and

"Whereas in conformity with Article III. of the said agreement I sat in Bangkok on the 1st day of February 1898 and on nine subsequent days and examined the statements, pleadings, documents, proofs, and other matter submitted to me, and also listened to the arguments presented to me on behalf of the parties; and

"Whereas all other preliminary matters referred to in the said agreements were duly carried out by the parties. Now having fully taken into consideration the said agreement and also the cases, counter-cases, documents, evidence, and arguments, and likewise all other communications made to me by the parties during the progress of the sittings, and having impartially and carefully examined the same, I have arrived at the decision embodied in the present award:

"Whereas on and after the 20th day of August 1892 the Siamese Government seized and entered into possession of property in the possession of and under the control of Marion A. Cheek; and

"Whereas I am of opinion that such seizure and entry into possession was a violation of the second article of the treaty of 1856 between the United States of America and the Kingdom of Siam; and

"Whereas in justification of the said seizure and entry into possession it has been alleged that the said Dr. Marion A. Cheek made default in the performance of certain conditions of certain agreements made between him and the Siamese Government, one of which conditions was alleged to be the payment of interest upon a loan made by the Siamese Government to the said Dr. Marion A. Cheek upon the 31st day of March of each year; and

"Whereas it is necessary that before default in the performance of a condition can be proved, the existence of the condition in the contract must first be demonstrated; and

"Whereas I am of opinion that it was not proved to my satisfaction that the said contracts contained, or that their wording necessarily implied, in the minds of the parties such a condition as was alleged to have been broken; and

"Whereas it has not been proved to my satisfaction that the said Dr.



Marion A. Cheek did make default in the performance of any other of the conditions alleged to have been contained in the said agreement so as to justify the Siamese Government in its action; and

"Whereas on the 15th day of July 1893 the Siamese Government issued or permitted to be issued an order alluded to in the correspondence and at the hearing as the Chieng Mai order, which was in my opinion unjustifiable and which said order was calculated to and did greatly injure the said Dr. Marion A. Cheek; and

"Whereas I am of opinion that the estate of the late Dr. Marion A. Cheek should as far as possible be placed in the same position as it would have been in had not the Siamese Government seized the property in the control and possession of Dr. Cheek in August 1892 and had not the said government issued or permitted to be issued the Chieng Mai order, I hereby award to the estate of the late Dr. Marion A. Cheek the sum of ticals 706,721 (seven hundred and six thousand seven hundred and twenty-one) as the indemnity to be paid by the Siamese Government for the satisfaction of all claims referred to my consideration, and I further award that the "bill of sale mortgage" of the 23d April 1889 is now void, the amount of the loan together with the interest for which it was given, having been taken into account by me in reckoning the sum due by the Siamese Government to the Cheek estate, and the property by the said bill of sale; and

"Whereas it was alleged by the said Dr. Marion A. Cheek and by his representatives that the Siamese Government had promised to grant to the said Dr. Cheek the lease of certain forests in the correspondence and at the hearing referred to as "The Nan Forest" and compensation for the non-fulfillment of the said promise was claimed by the Cheek estate; and

"Whereas it was not proved to my satisfaction that any such promise was ever made, I hereby decide and award that the Cheek estate shall not recover anything from the Siamese Government upon this portion of their claim. In testimony whereof this present decision and award has been made in duplicate and signed by me this 21st day of March 1898 at Shanghai in the Empire of China.

"(Signed)

NICHOLAS J. HANNEN.

"Signed by the said Sir Nicholas John Hannen in the presence of

"(Signed)

R. S. MANSFIELD,

"H. B. M. Acting Consul-General.

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#### "MEMORANDUM.

"I am of opinion that, whether a breach of the conditions of the agreement or mortgage of the 23d day of April 1889 had taken place on the 20th of August 1892 or not, the Siamese Government adopted a wrong course in entering into possession of the mortgaged property.

"There was, in my opinion, at this time a dispute within the meaning of Article II. of the treaty of 1856, and it was not competent to one of the parties to this dispute to determine that its view was the correct one, and act upon that view without reference to the authorities of the other party to the dispute.

"The Siamese Government was bound to appeal to the United States consul before taking any action with regard to the property in the possession of a United States citizen.

"The next question which I have to determine is whether there had been a default made by M. A. Cheek in the performance of the conditions of the mortgage or in the performance of the conditions of the articles of agreement.

"Until such default had been made, by the express terms of the agreement M. A. Cheek was to have the management of 'the said teakwood and elephants,' that is, of the teakwood and elephants mortgaged to the Siamese Government.

"Before any default in the performance of the conditions of the agreement or mortgage can be said to have been made, it is for the party alleging the default to prove that the conditions alleged to have been broken exist in the contract.

"What were the conditions alleged to have existed in the contract which it is said that M. A. Cheek broke?

"1. The payment of interest on the 31st of March 1891 and on the 31st of March 1892.

"2. An undertaking not to submortgage any of the property.

"3. To deal with the property in certain specified ways.

"4. To deliver to Prince Warawannakorn proper accounts.

"These conditions I take from Mr. Carver's opening statement on behalf of the Siamese Government.

"Now none of these conditions are specifically contained in the agreement or in the mortgage, except the undertaking to furnish proper accounts, and with regard to this I find that Dr. Cheek furnished to the Prince reasonably proper accounts, and that the Prince waived the production of further and better accounts.

"With regard to the condition 2, I do not think that it can be reasonably imported into the agreement, and I do not think Dr. Cheek did anything which can be construed into an improper submortgage of the property mortgaged to the Siamese Government.

"He endeavored to make that property liable to the Borneo Company for the payment of certain sums of money, but those payments were such as in any case would have been a first charge upon the wood.

"These were payments in order to obtain possession of and convey the wood to Bangkok and sell it there, and must necessarily have come out of the proceeds before these were handed over to the Siamese Government.

"As to condition 3, I do not think the Siamese Government seriously contend that there was any such breach of it as would have justified them in their course of action, apart from any other breaches, and I find that Dr. Cheek did not deal with the property in a manner contrary to the agreement. In fact, from the letter of Prince Nara to Dr. Eaton, and the whole of the correspondence, as also from the evidence of Prince Nara given before me, I distinctly came to the conclusion that all these alleged breaches were not in the mind of the Siamese Government at the time of the seizure, and it never would have occurred to the Siamese Government to make the seizure had the interest on the loan been paid. The main, and until lately the only, breach which the Siamese Government relied upon was the first viz, the nonpayment of interest on the 31st of March 1891 and the 31st of March 1892. That interest at the rate of 7½ per cent per annum upon the loan was payable is undoubtedly one of the conditions of the mortgage.

"It is alleged by the Siamese Government that this interest was payable on the 31st of March of each year.

"There is no undertaking, in so many words, to do this to be found in the agreement or the mortgage, and the usual clause in mortgages by which the mortgagor undertakes to pay the interest on certain fixed days is not to be found in the documents.

"From the evidence and from the letters of the parties it is evident that Prince Warawannakorn had not at the time of entering into the contract any distinct idea as to the time at which the interest was payable. He at first thought it should be paid monthly, then quarterly, and finally he wrote and said that he was willing that it should be calculated yearly.

"From this it is clear that one party to the agreement did not at the time of entering into it imagine that the other had promised to pay the

interest on the 31st of March of each year. There can be no doubt that the other party, Dr. Cheek, never believed that he had made any such promise. It results from this that neither in the written agreement or the mortgage, nor in the minds of either of the parties at the time of entering into the contract, was there any undertaking to pay interest under all circumstances on the 31st of March of each year.

"As no such condition existed, it could not be broken, and therefore I hold that the Siamese Government have not proved that Dr. Cheek made default in the performance of any condition of the mortgage or agreement so as to entitle them to deprive him of the management of the teakwood and elephants and to enter into possession of the mortgaged property.

"The Siamese Government was therefore, in my opinion, wrong in its construction of the mortgage and agreement and wrong in the method which it adopted of enforcing that view.

"Under these circumstances there can be no doubt that the Chieng Mai order was unjustifiable. Some portions of it the Siamese Government have from the beginning, and Mr. Carver on their behalf at the hearing, admitted were unjustifiable. I conceive that I am entitled to take a broad view of that order and not to analyze its exact words and their legal effect.

"I am bound to say that, doing this, and taking into consideration the nature of the Government of Siam and my knowledge of Eastern people, I come to the conclusion that the effect of such an order must have been, as described by the witnesses for the Cheek estate, a complete boycott. I have arrived at these conclusions without any doubt, and, notwithstanding the able arguments of Mr. Carver, without much difficulty, but when I come to the question of damages the case seems to me to be much more intricate.

"I think Dr. Cheek and Dr. Cheek's estate have in some cases claimed damages for the same thing twice over, and they have claimed for some things which they are not in my opinion entitled to claim for at all. For instance, the claim for payment for Dr. Cheek's services at a certain rate per annum and the claim for elephants lost, stolen, or dead are not in my opinion maintainable. The result is that I must arrive at the damages in a perfectly different manner from that adopted by Dr. Cheek and his estate.

"I think Dr. Cheek's estate is entitled to be put as nearly as possible in the same position as it would have been in had the Siamese Government done nothing but had allowed the agreement of April 1889 to run its course. I think it may be assumed that the agreement with the Borneo Company would have been carried out had not the Siamese Government intervened, and that if that agreement had come to an end Dr. Cheek would have been able to effect a similar agreement with the Borneo Company or someone else, and upon this basis I have endeavored to work out what would now have been the position of the estate.

"With regard to the Nan Forests, it was for the Cheek estate to prove that a promise was given that Dr. Cheek should have a lease of them. I come to the conclusion from the evidence, oral and documentary, which was laid before me, that no such promise has been proved. In coming to this conclusion I have not forgotten that the estate has been deprived by the death of Dr. Cheek of his direct evidence upon the subject, but I think that from the written evidence before me, even if he had directly contradicted the evidence of Prince Devawongse, I should have come to the same conclusion. He seems to have paid Moung Guna 25,000 teicals in settlement of his claim, and this amount must be credited to the estate in the settlement of the account.

"On the last day of hearing, Mr. Platt, on behalf of the estate, asked that to any sum I should find due to the estate I should add some substantial amount for the infringement of Dr. Cheek's treaty rights. I can understand that under some circumstances such a course would be right; but Mr. Platt described the sum he claimed as in the nature of a fine, and in this case there are circumstances which would render it quite unjust that anything in the nature of a fine should be inflicted on the Siamese Government.

"In the first place, I am convinced that they acted throughout under a

*bona fide* misconception of their rights; in the next place, it is to be observed that they were at once willing to submit the whole question to arbitration, although had they stood upon their strict rights they might have insisted on Dr. Cheek's proceeding against them in the law courts of the country.

"I think, therefore, that under all the circumstances of the case no damages in the nature of a fine can be claimed against the Siamese Government for the breach of the treaty rights of Dr. Cheek, which the government in my opinion committed.

"I think that the Cheek estate is entitled to be paid for the costs of recovering the amount which I find is due to it. Dr. Cheek estimated these at 3 per cent on the amount, and this is the sum which I purpose to allow the estate under this head.

I do not think that anything should be allowed for the depreciation in the value of silver. It is impossible to say to what extent this depreciation in the value of silver has been the cause of the increase in the price of teak in these latter years, and my method of arriving at the position of the Cheek estate makes such a claim inappropriate. I append an account showing the method by which I arrive at the amount due to the Cheek estate as at the 31st of March 1898.

"(Signed)

NICHOLAS J. HANNEN.

"SHANGHAI, 21, 3, '98.

#### "THE ACCOUNT.

"In this account I have assumed that Dr. Cheek, or his estate, would have been able to work down on an average 8,000 logs a year. It is the average of the 3 years previous to and subsequent to the seizure:

Season.	No. logs del. in B'kok.	Expenses per log.	Total expenses.	Proceeds of sale.	Selling commission @ 2½ %.	Net proceeds.
		<i>Rs. Cts. Pks. Tcs.</i>	<i>Tcs.</i>	<i>Pikat. Tcs.</i>	<i>Tcs.</i>	<i>Tcs.</i>
'92-93	7,567	8.34 @ 45 = 6.25	47,293.75	4½ = 238,360.50	5,959 —	185,107.75
		<i>Pikat. Tcs.</i>				
'93-94	10,000	1½ = 10.50	105,000 —	4½ = 315,000 —	7,875 —	202,125 —
'94-95	7,255	1½ = 10.50	76,177.50	5½ = 279,317.50	6,982.93	196,157.07
'95-96	8,000	2 = 14 —	112,000 —	336,000 —	8,400 —	215,600 —
'96-97	8,000	2 = 14 —	112,000 —	7 = 392,000 —	9,800 —	270,200 —
'97-98	8,000	2 = 14 —	112,000 —	16 = 896,000 —	22,400 —	761,600 —

"Amount of principal and interest due at end of season .....	1,013,670	
"From this must be deducted the sum of ticals, 25,000, paid by Dr. Cheek to Moung Guna .....	25,000	988,670
"Amount of net proceeds .....	185,107	
"Less ½ profit, at ticals 5 per log .....	12,611	172,496
"Principal and interest due at end of season '92-93 .....	816,174	
"Add interest up to end of season '93-94 .....	61,213	
"Amount of principal and interest due at end of season '93-94 ..	877,387	
"Net proceeds of sales .....	202,125	
"Less ½ profit, at ticals 5 per log .....	16,666	185,459
"Principal due at end of season '93-94 .....	691,928	
"Add interest to end of season '94-95 .....	51,894	
"Amount of principal and interest due at end of season '94-95 ..	743,822	

"Net proceeds of sales.....	196, 157	
"Less $\frac{1}{4}$ profit, at ticals 5 per log.....	12, 091	
	<hr/>	184, 066
"But in order to have 8,000 logs brought down next season Dr. Cheek would have to retain sufficient ready money to pay for 3,000 logs, beside those in hand, say, at ticals 14 per log.....	42, 000	
	<hr/>	142, 066
"Principal due at end of season '94-95.....	601, 756	
"Add interest to end of season '95-96.....	45, 131	
	<hr/>	646, 887
"Principal and interest due at end of '95-96.....		646, 887
"Net proceeds of sales.....	215, 600	
"Less $\frac{1}{4}$ profit, at ticals 5 per log.....	13, 333	
"And cash for purchase of 4,000 logs next season.....	56, 000	
	<hr/>	69, 333
	<hr/>	146, 267
"Principal due at end of season '95-96.....	500, 620	
"Add interest due at end of '96-97.....	37, 546	
	<hr/>	538, 166
"Principal and interest due at end of season '96-97.....		538, 166
"Net proceeds of sale.....	270, 200	
"Less $\frac{1}{4}$ profit, at ticals 6 per log.....	16, 000	
"Cash for purchase 4, 000 fresh logs next season, at 14 ticals per log.....	56, 000	
	<hr/>	72, 000
	<hr/>	198, 200
"Principal due at end of season '96-97.....	339, 966	
"Add interest due at end of season '97-98.....	25, 497	
	<hr/>	365, 463
"Amount of principal and interest due at end of season '97-98..		365, 463
"Net proceeds of sale.....	761, 600	
"Less $\frac{1}{4}$ profit, at ticals 10 per log.....	80, 000	
	<hr/>	681, 600
"Balance in favor of Dr. Cheek at end of season '97-98.....		316, 137
"The mortgage will therefore have been more than paid off by end of season '97-98, and all the mortgaged property will be released, including the 1,843 logs still to come down, which have been sold to the Chinese, the net proceeds of which may be estimated at.....		170, 000
"But had the Siamese Government not interfered the business would now be a flourishing one, whereas it is not now a going concern.		
"For the difference between the present state of the business, and what it would have been at the end of season '97-98, I allow.....		200, 000
"For costs of recovering ticals 686,137, at 3 per cent.....		20, 584
	<hr/>	
"Total amount due as damages from the Siamese Government to the Cheek estate..... ticals..		706, 721

"The agreements of 1889 and 1890 should be considered at an end under clause 9, and all the mortgaged property must be taken as released from the mortgage which has now become void under the proviso in the bill of sale.

"[The property released from the mortgage will of course not include the 1,843 balance of logs on hand in August 1892, for which I have allowed ticals 170,000.]

"(Signed)

NICHOLAS J. HANNEN.<sup>1</sup>

"SHANGHAI, March 21, 1898."

**The Costa Rica-Nicaraguan Boundary: General Alexander's Award.**—At page 1968 of volume 2 of this work we referred to the fact that proceedings had begun under a convention between Costa Rica and Nicaragua, concluded on April 8, 1896, for the demarcation of the boundary between the two republics. The commissioners having disagreed, the President of the United States named as engineer-umpire Gen. E. P. Alexander, who rendered the following award:

"SAN JUAN DEL NORTE, NICARAGUA,

"September 30, 1897.

"*To the Commissions of Limits of Costa Rica and Nicaragua.*

"GENTLEMEN: In pursuance of the duties assigned me by my commission as engineer-arbitrator to your two bodies, with the power to decide finally any points of difference that may arise in tracing and marking out the boundary line between the two republics, I have given careful study and consideration to all arguments, counter arguments, maps, and documents submitted to me in the matter of the proper location of the initial point of the said boundary line upon the Caribbean coast.

"The conclusion at which I have arrived and the award I am about to make do not accord with the views of either commission. So, in deference to the very excellent and earnest arguments so faithfully and loyally

<sup>1</sup> See, generally, as to arbitration, Mr. Fish, Sec. of State, to Messrs. Plummer and Lukens, December 17, 1875, MSS. Dept. of States; Address to the People of the United States, February 22, 1850, Sumner's Works, II. 393; Sumner's True Grandeur of Nations, Sumner's Works, XV. 273; De la création d'un code de droit international et de l'institution d'un hant tribunal, par M. Patrice Larroque; Bellaire, Étude historique sur les arbitrages, in Journal des Économistes, 1872, p. 417; Geffcken, Recueil des traités et conventions, II. 1870-1878, p. 209; Arbitration, by F. R. Condert, Harper's Magazine, November 1893, p. 918; Les Traités d'arbitrage permanent entre peuples, par Émile Arnaud, 1895; Report of Committee on International Law, American Bar Association, August 20, 1896, on International Arbitration; Essai sur l'Organisation de l'arbitrage international, mémoire aux puissances, par Le Chevalier Descamps, sénateur de Belgique, président de l'Union interparlementaire (Bruxelles, 1896); Patriotism and International Brotherhood, a baccalaureate address delivered by James Burrill Angell, LL.D., June 23, 1896 (published by the University of Michigan, 1896); Annual Message of President Grant, 1873; Annual Message of President Arthur, 1882; Reports of Lake Mohonk Conference on International Arbitration, 1895, 1896, 1897.

For the project of Henry IV. of France for an international tribunal, see Memoires de Sully, liv. XXX. See also, Abbé St. Pierre's *Projet de Paix perpétuelle*; Kant's *Essai sur la Paix perpétuelle*; Saint Simon's *Réorganisation de la Société européenne*; Chateaubriand, *Génie du Christianisme*, II, 271, quoted by Mr. L. Oscar Kuhus, *The Nation*, July 2, 1896.

urged by each commission for its respective side, I will indicate briefly my line of thought and the considerations which have seemed to me to be paramount in determining the question; and of these considerations the principal and the controlling one is that we are to interpret and give effect to the treaty of April 15, 1858, in the way in which it was mutually understood at the time by its makers.

"Each commission has presented an elaborate and well-argued contention that the language of that treaty is consistent with its claim for a location of the initial point of the boundary line at a place which would give to its country great advantages. These points are over six miles apart, and are indicated on the map accompanying this award.

"The Costa Rican claim is located on the left-hand shore or west headland of the harbor; the Nicaraguan on the east headland of the mouth of the Taura branch.

"Without attempting to reply in detail to every argument advanced by either side in support of its respective claim, all will be met and sufficiently answered by showing that those who made the treaty mutually understood and had in view another point, to wit, the eastern headland at the mouth of the harbor.

"It is the meaning of the men who framed the treaty which we are to seek, rather than some possible meaning which can be forced upon isolated words or sentences. And this meaning of the men seems to me abundantly plain and obvious.

"This treaty was not made hastily or carelessly. Each state had been wrought up by years of fruitless negotiations to a state of readiness for war in defense of what it considered its rights, as is set forth in article 1. In fact, war had actually been declared by Nicaragua on November 25, 1857, when, through the mediation of the Republic of Salvador, a final effort to avert it was made, another convention was held, and this treaty resulted. Now, we may arrive at the mutual understanding finally reached by its framers by first seeking in the treaty as a whole for the general idea or scheme of compromise upon which they were able to agree. Next, we must see that this general idea of the treaty as a whole harmonizes fully with any description of the line given in detail, and the proper names of all the localities used, or *not used*, in connection therewith, for the *nonuse* of some names may be as significant as the use of others. Now, from the general consideration of the treaty as a whole the scheme of compromise stands out clear and simple.

"Costa Rica was to have as a boundary line the right or southeast bank of the river, considered as an outlet for commerce, from a point 3 miles below Castillo to the sea.

"Nicaragua was to have her prized 'sumo imperio' of all the waters of this same outlet for commerce, also unbroken to the sea.

"It is to be noted that this division implied also, of course, the ownership by Nicaragua of all islands in the river and of the left or northwest bank and headland.

"This division brings the boundary line (supposing it to be traced downward along the right bank from the point near Castillo) across both the Colorado and the Taura branches.

"It can not follow either of them, for neither is an outlet for commerce, as neither has a harbor at its mouth.

"It must follow the remaining branch, the one called the Lower San Juan, through its harbor and into the sea.

"The natural terminus of that line is the right-hand headland of the harbor mouth.

"Next let us note the language of description used in the treaty, telling whence the line is to start and how it is to run, leaving out for the moment the proper name applied to the initial point. It is to start 'at the mouth of the river San Juan de Nicaragua, and shall continue following the right bank of the said river to a point three English miles from Castillo Viejo.'

"This language is evidently carefully considered and precise, and there is but one starting point possible for such a line, and that is at the right headland of the bay.

"Lastly, we come to the proper name applied to the starting point, 'the extremity of Punta de Castillo.' This name Punta de Castillo does not appear upon a single one of all the original maps of the bay of San Juan which have been presented by either side, and which seem to include all that were ever published before the treaty or since. This is a significant fact, and its meaning is obvious. Punta de Castillo must have been, and must have remained, a point of no importance, political or commercial, otherwise it could not possibly have so utterly escaped note or mention upon the maps. This agrees entirely with the characteristics of the mainland and the headland on the right of the bay. It remains until to-day obscure and unoccupied, except by the hut of a fisherman. But the identification of the locality is still further put beyond all question by the incidental mention, in another article of the treaty itself, of the name Punta de Castillo.

"In Article V. Costa Rica agrees temporarily to permit Nicaragua to use Costa Rica's side of the harbor without payment of port dues, and the name Punta de Castillo is plainly applied to it. Thus we have, concurring, the general idea of compromise in the treaty as a whole, the literal description of the line in detail, and the verification of the name applied to the initial point by its incidental mention in another portion of the treaty, and by the concurrent testimony of every map maker of every nation, both before the treaty and since, in excluding this name from all other portions of the harbor. This might seem to be sufficient argument upon the subject, but it will present the whole situation in a still clearer light to give a brief explanation of the local geography and of one special peculiarity of this Bay of San Juan.

"The great feature in the local geography of this bay, since our earliest accounts of it, has been the existence of an island in its outlet, called on some early maps the island of San Juan. It was an island of such importance as to have been mentioned in 1820 by two distinguished authors, quoted in the Costa Rican reply to Nicaragua's argument (page 12), and it is an island to-day, and so appears in the map accompanying this award. The peculiarity of this bay, to be noted, is that the river brings down very little water during the annual dry season. When that happens, particularly of late years, sand bars, dry at all ordinary tides, but submerged more or less and broken over by the waves at all high ones, are formed, frequently reaching the adjacent headlands, so that a man might cross dry-shod.



"Now, the whole claim of Costa Rica is based upon the assumption that on April 15, 1858, the date of the treaty, a connection existed between the island and the eastern headland, and that this converted the island into mainland, and carried the initial point of the boundary over to the western extremity of the island. To this claim there are at least two replies, either one seeming to me conclusive.

"First, the exact state of the bar on that day can not be definitely proven, which would seem to be necessary before drawing important conclusions.

"However, as the date was near the end of the dry season, it is most probable that there was such a connection between the island and the eastern Costa Rican shore as has been described. But even if that be true, it would be unreasonable to suppose that such temporary connection could operate to change permanently the geographical character and political ownership of the island. The same principle, if allowed, would give to Costa Rica *every island in the river* to which sand bars from her shore had made out during that dry season. But throughout the treaty the river is treated and regarded as an outlet of commerce. This implies that it is to be considered as in average condition of water, in which condition alone it is navigable.

"But the overwhelming consideration in the matter is that by the use of the name of Punta de Castillo for the starting point, instead of the name Punta Arenas, the makers of the treaty intended to designate the mainland on the east of the harbor. This has already been discussed, but no direct reply was made to the argument of Costa Rica quoting three authors as applying the name Punta de Castillo to the western extremity of the before-mentioned island, the point invariably called Point Arenas by all the naval and other officers, surveyors, and engineers who ever mapped it.

"These authors are L. Montufar, a Guatemalan, in 1887; J. D. Gamez, a Nicaraguan, in 1889, and E. G. Squier, an American, date not given exactly, but subsequent to the treaty. Even of these, the last two merely used, once each, the name Punta de Castillo as an alternate for Punta Arenas. Against this array of authority we have, first, an innumerable number of other writers clearly far more entitled to confidence; second, the original makers of all the maps, as before pointed out, and third, the framers of the treaty itself, by their use of Punta de Castillo in Article V.

"It must be borne in mind that for some years before the making of this treaty Punta Arenas had been by far the most important and conspicuous point in the bay. On it were located the wharves, workshops, offices, etc., of Vanderbilt's great transit company, conducting the through line from New York to San Francisco during the gold excitement of the early fifties. Here the ocean and river steamers met and exchanged passengers and cargo. This was the point sought to be controlled by Walker and the filibusters.

"The village of San Juan cut no figure at all in comparison, and it would doubtless be easy to produce by hundreds references to this point as Punta Arenas by naval and diplomatic officers of all prominent nations, by prominent residents and officials, and by engineers and surveyors con-

stantly investigating the canal problem, and all having a personal knowledge of the locality.

"In view of all these circumstances, the jealousy with which each party to the treaty defined what it gave up and what it kept, the prominence and importance of the locality, the concurrence of all the original maps in the name, and its universal notoriety, I find it impossible to conceive that Nicaragua had conceded this extensive and important territory to Costa Rica, and that the latter's representative had failed to have the name Punta Arenas appear anywhere in the treaty. And for reasons so similar that it is unnecessary to repeat them, it is also impossible to conceive that Costa Rica should have accepted the Taura as her boundary and that Nicaragua's representative should have entirely failed to have the name Taura appear anywhere in the treaty.

"Having then designated generally the mainland east of Harbor Head as the location of the initial point of the boundary line, it now becomes necessary to specify more minutely, in order that the said line may be exactly located and permanently marked. The exact location of the initial point is given in President Cleveland's award as the 'extremity of Punta de Castillo, at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th of April 1858.'

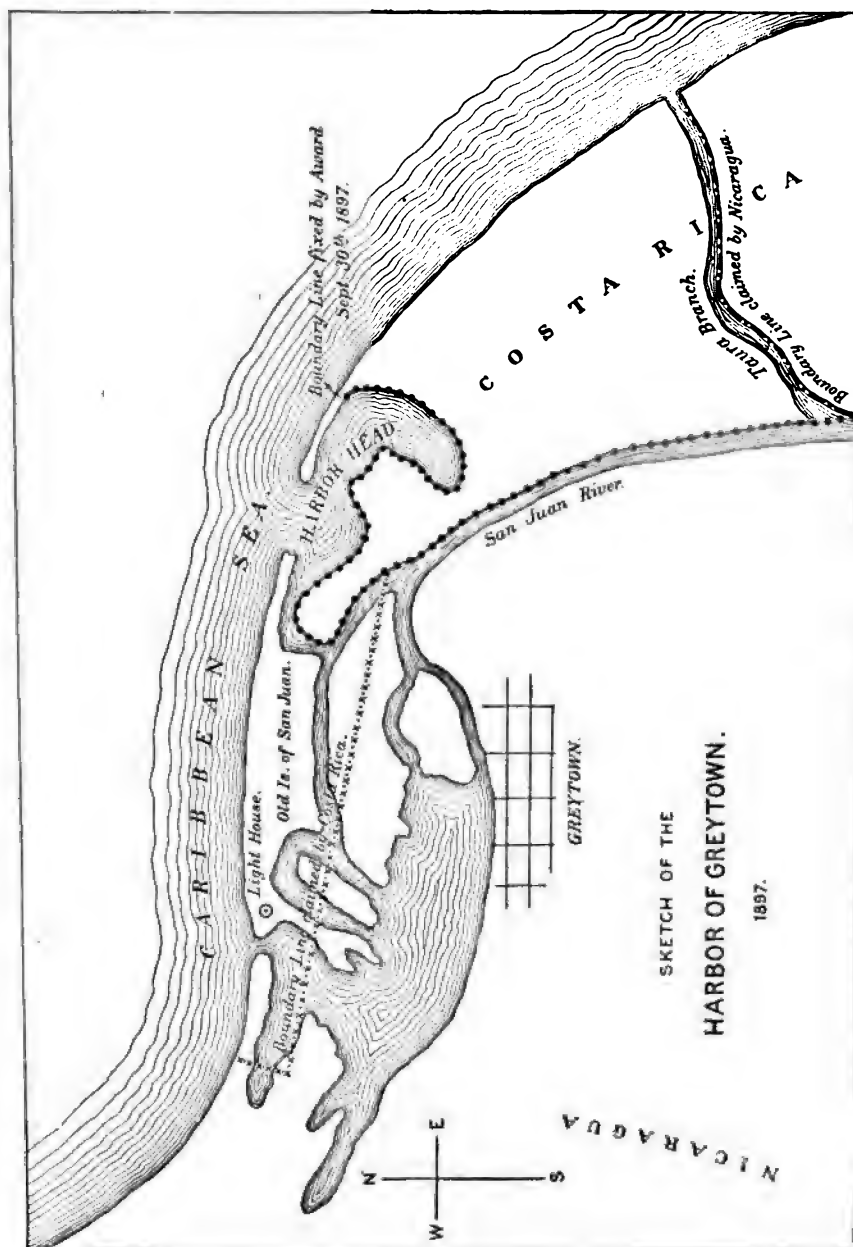
"A careful study of all available maps and comparisons between those made before the treaty and those of recent date made by boards of engineers and officers of the canal company, and one of to-day made by yourselves to accompany this award, makes very clear one fact: The exact spot which was the extremity of the headland of Punta de Castillo April 15, 1858, has long been swept over by the Caribbean Sea, and there is too little concurrence in the shore outline of the old maps to permit any certainty of statement of distance or exact direction to it from the present headland. It was somewhere to the northeastward, and probably between 600 and 1,600 feet distant, but it can not now be certainly located. Under these circumstances it best fulfills the demands of the treaty and of President Cleveland's award to adopt what is practically the headland of to-day, or the northwestern extremity of what seems to be the solid land, on the east side of Harbor Head Lagoon.

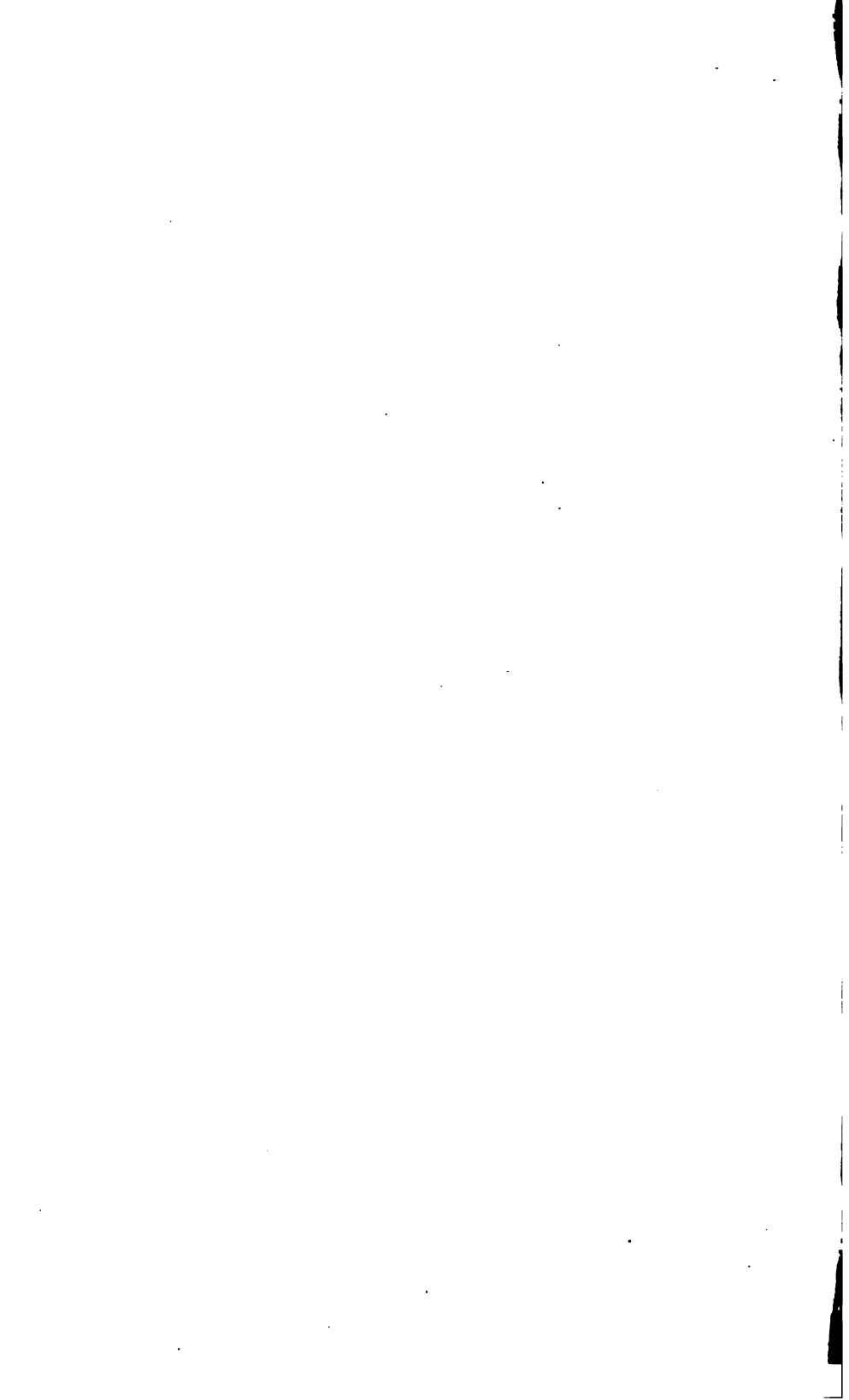
"I have accordingly made personal inspection of this ground, and declare the initial line of the boundary to run as follows, to wit:

"Its direction shall be due northeast and southwest, across the bank of sand, from the Caribbean Sea into the waters of Harbor Head Lagoon. It shall pass, at its nearest point, 300 feet on the northwest side from the small hut now standing in that vicinity. On reaching the waters of Harbor Head Lagoon the boundary line shall turn to the left, or southeastward, and shall follow the water's edge around the harbor until it reaches the river proper by the first channel met. Up this channel, and up the river proper, the line shall continue to ascend as directed in the treaty.

"I am, gentlemen, very respectfully, your obedient servant,

"E. P. ALEXANDER."





#### CASE OF THE "HAVANA PACKET" AWARD.

At page 5037 it is stated that in this case President Grévy made an award in favor of the Netherlands. Since that statement was written, I have received from Mr. William F. Powell, envoy extraordinary and minister plenipotentiary to Haiti and chargé d'affaires to the Dominican Republic, a copy of the award, which the latter Government was so good as to furnish him for my use. The text of the award is as follows:

Nous Jules Grévy, Président de la République Française;

Statuant en vertu des pouvoirs qui nous ont été conférés aux termes du compromis signé à la Haye, le 26 Mars 1881, par lequel le Gouvernement des Pays-Bas et le Gouvernement de St. Domingue sont convenus de déférer au Président de la République Française pour être réglé par lui et sans recours le litige qui est pendant entre eux depuis 1878 au sujet de la saisie du navire Havana Packet.

Vu les pièces fournies par les deux Gouvernements, notamment:

1. Une lettre en date du 26 Septembre 1879, adressée au Ministre des Affaires Étrangères de France par M. le Baron de Zuylen de Nyevelt, Ministre des Pays-Bas à Paris;

2. Une lettre en date du 18 Mai 1880 adressée au Ministre des Affaires Étrangères de France par M. Paz, Ministre de la République Dominicaine à la Haye;

3. Une lettre en date du 28 Mars 1881 adressée au Ministre des Affaires Étrangères de France par M. le Baron de Zuylen de Nyevelt, et transmettant:

a./ le texte du compromis intervenu entre les deux Gouvernements intéressés.

b./ un exposé des faits.

c./ une note sur la loi Dominicaine du 15 Mai 1876.

d./ le dossier du procès du Capitaine Harken et la correspondance échangée entre le Consul des Pays-Bas à Santo Domingo et les Autorités Dominicaines;

4. Une lettre en date du 11 Octobre 1881 adressée au Ministre des Affaires Étrangères de France par M. Paz, et transmettant,

a./ une copie certifiée des pièces de la procédure,

b./ le texte de la loi Dominicaine du 11 Août 1875,

c./ la gazette officielle du 2 Juin 1876, contenant le texte de la loi du 15 Mai 1876;

5. Une lettre en date du 18 Octobre 1881, adressée à M. le Ministre des Affaires Étrangères de France par M. le Baron de Zuylen de Nyevelt;

6. Une lettre en date du 21 Juillet 1882, adressée au Ministre des Affaires Étrangères de France par M. le Baron de Zuylen de Nyevelt, et relative aux indemnités réclamées par les Pays-Bas;

7. La réponse faite le 16 Octobre 1882, par le Gouvernement Dominicain à la communication de la lettre précédente;

La Commission instituée par Nous à l'effet d'étudier les documents respectivement produits nous, ayant fait part du résultat de son examen;

Attendu qu'il résulte de la dépêche du 18 Octobre 1881, ci-dessus visée, que le Gouvernement des Pays-Bas a retiré la demande d'arbitrage en tant qu'elle concerne une réparation à accorder à la Dame Dickinson;

Que l'arbitre n'a donc plus à s'occuper que des faits relatifs au Capitaine Harken et au navire "Havana Packet";

Attendu que des termes exprès du compromis, il résulte que l'Arbitre a d'abord à rechercher si les faits imputés au Capitaine Harken, qui ont donné lieu à diverses sentences des tribunaux Dominicains, sont établis par les pièces de la procédure;

Attendu qu'aucune constatation matérielle n'a été relevée à la charge du Capitaine Harken, que le fait qui a motivé son arrestation et la confiscation du navire "Havana Packet" ne résulte que des dépositions de trois ou quatre témoins;

Attendu que ces dépositions, qui sont contredites par d'autres, qui contiennent des détails invraisemblables, n'ont pas été faites en présence du Capitaine Harken, qui n'a jamais été confronté avec leurs auteurs, alors que rien n'était plus facile que d'opérer cette confrontation; qu'il y a là un vice essentiel de procédure qui ôte toute valeur probante à l'enquête;

Attendu, en conséquence, que le fait reproché au Capitaine Harken n'est nullement prouvé et que les mesures rigoureuses prises par les Autorités Dominicaines contre lui, contre son second et contre le navire, ne sont pas justifiées;

Qu'il n'y a pas lieu, dès lors, d'examiner si le fait allégué tombait sous le coup de la Loi Dominicaine du 19 Mai 1876, ni si cette loi est, ou non, conforme aux principes du droit international;

Attendu que le compromis charge l'arbitre, dans le cas où le Gouvernement Dominicain serait déclaré responsable, de fixer l'indemnité qui doit être payée;

Attendu qu'en tenant compte de la valeur du navire confisqué, des dépenses diverses nécessitées par le procès de l'emprisonnement et des mauvais traitements subis par le Capitaine et son Second, du séjour prolongé que le Capitaine a dû faire à St. Domingue, et du temps qui s'est écoulé depuis que le dommage a été causé jusqu'à ce jour, il convient de fixer à cent quarante mille francs le chiffre de l'indemnité due par

le Gouvernement de Saint Domingue au Gouvernement des Pays-Bas;

Par ces motifs,

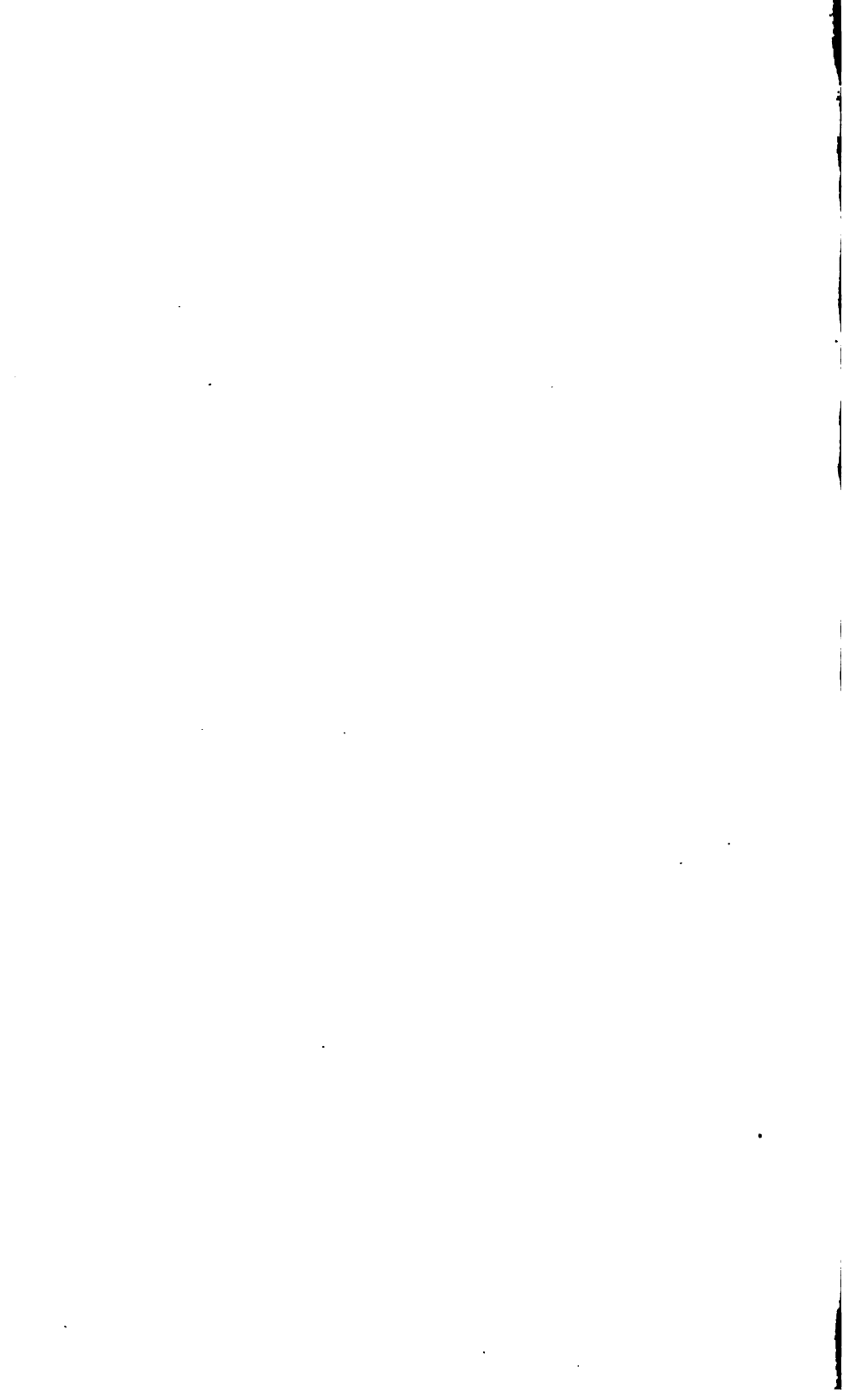
Jugeons que le Gouvernement Dominicain doit réparation au Gouvernement des Pays-Bas pour les mesures prises contre le Capitaine Harken et le navire "Havana Packet";

Fixons à cent quarante mille francs l'indemnité due de ce chef par le Gouvernement Dominicain, indemnité qui devra être payée à Paris, en monnaie ayant cours en France.

Paris, le 16 Mars 1883.

Le Président de la République Française,

(Signé.) JULES GRÉVY.





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